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No. 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

TIME, INC.,

Appellant,

—against—

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE APPELLANT ON REARGUMENT

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TIME, INC., *Appellant,* *-against-* JAMES J. HILL, *Appellee.*	}	No. 22

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR THE APPELLANT ON REARGUMENT

STATEMENT

At the beginning of the proceedings in this Court appellant sought to avoid extensive factual disagreement by adopting the statement of facts in the majority opinion of the Appellate Division and by conceding both inaccuracy and negligence—thereby abandoning its contention advanced throughout the courts below that the LIFE article could not properly be described as "fictionalized" even as defined by New York law (jurisdictional statement, pp. 5-6, 19-20).*

That effort has been largely unsuccessful. The brief for appellee on reargument has departed from the record

*It is ironic that the *amicus curiae*, who did not choose to participate in the proceedings below although the much earlier Appellate Division opinion was reported and widely commented on, claims that appellant tried to establish the complete accuracy of its report to the detriment of a full constitutional argument in the Court of Appeals (p. 11). Such a constitutional argument was in fact advanced in that court, however, and the subject has been conclusively settled by the amended remittitur (R. 457).

and from the findings and conclusions contained in the opinions below to the extent of invoking supporting references not drawn from the evidence but rather from appellee's own prior briefs (pp. 3-5).* For example, in view of the sole inaccuracy in this case, that is, the use (albeit ambiguous) of the word "re-enacted," the express determination by the courts below that the Hills could properly have been mentioned in the LIFE article (R. 41), and the concession made by counsel for appellee last Term in response to a question put by The Chief Justice that substitution of the single word "reminiscent" would have rendered the article blameless, it is remarkable that appellee can now speak of a "hoax executed with painstaking precision" (p. 3).**

Similarly, notwithstanding the close connection found by earlier reviewers (R. 326, 429), the Hills' friends and business acquaintances (R. 66, 279), and by Mr. and Mrs. Hill themselves (R. 277-86, 390, 413-14), THE DESPERATE HOURS story is now described as "the antithesis" of the actual event (p. 4).*** Worst of all, it is now claimed that "all of this ["antithesis"] was known to appellant when

*This technique of overstated generalization on a factual basis that is nonexistent or sparse is similar to the flexible concept of "fictionalization" enabling New York judges to condemn publications they do not like and vice versa. See *Donahue* v. *Warner Bros. Distrib. Corp.*, 2 Utah 2d 256, 272 P. 2d 177, 182-83 (1954).

**Compare the finding below in appellee's favor: "Defendant merely concluded that basically the play was a re-enactment and so stated." (R. 439.)

***Paragraph 22 of the original verified complaint reads as follows:

> "In truth and in fact, said novel was based upon the actual occurrences of September, 1952 in which plaintiffs Hill were involved, as above set forth, with certain modifications of the actual facts, including the partial modification of the name of the family involved from 'Hill' to 'Hilliard', the reduction of the size of the besieged family, the creation of numerous melodramatic and violent incidents which did not in fact occur, the insinuation of sexual approaches by one of the convicts to the hostage daughter, and with numerous other fictional embellishments in the characterization of the personalities, relationships, attitudes and acts of the members of the besieged family." (R. 390.)

it prepared and published the LIFE article" (*ibid.*). It is difficult to rebut unsupported conclusions of this sort without resorting to a page-by-page examination of the entire record. Suffice it to say that nothing in the record supports these conclusions, and virtually all of the inferences that can fairly be drawn from the evidence point the other way, that is, in favor of appellant's demonstrable good faith. The earlier reviews, the host of similarities between the play and the event, the information furnished by the producer and the author of the play and by a friend of the author that a real-life incident near Philadelphia was involved, and Mr. Hayes' arrangements for, and presence at, the photographing of scenes from the play at the Hills' former home, are examples (R. 108-15, 121, 145, 173-74, 180-82, 326, 429, Exs. 15, B, D).

We have thus come a long way from a case originally put to the jury on competing claims on the one hand that the article was entirely accurate and on the other that it was was fictionalized. In order to restore the original posture of the appeal to this Court, as framed by the differences between the two sets of opinions below, we suggest that the legal arguments advanced by the opposing briefs on reargument be considered in the context of those differences.

SUMMARY OF ARGUMENT

1. The briefs for appellee and the *amicus curiae* respectively have been unable to distinguish the New York decisions, approved in 1952 by the Court of Appeals, imposing liability for even truthful presentations of newsworthy items. Moreover, the opposing briefs fail to explain the many cases in which liability has rested upon basically truthful accounts, irrespective of the publisher's state of mind. Appellant has standing to challenge this aspect of the statute because its publication was basically truthful, because of the standing exception, and because, in any event, the court below necessarily upheld the criminal part of the New York statute on its face.

2. The opposing briefs are unable to cite a single opinion in which the concept of fictionalization is said to include intentional fabrication. Some cases involved deliberate misstatements as a matter of fact, but intentional fabrication or reckless disregard of the truth is nowhere treated or even alluded to as a condition of liability. As for the instructions in the present case, the *amicus curiae* virtually concedes they were silent on the question of intent; appellee is forced to argue they impliedly or presumptively included that element because of their reference to altered facts in the published article. The opposing briefs offer no meaningful explanation to support the trial court's final instruction on punitive damages, put to the jury under an alternative theory of negligence.

3. Last, the opposing briefs offer no constitutional criteria of their own by which to measure the New York statute. Passing over its provisions for criminal prosecution, injunctive relief, and punitive damages, they assert that the statute is a modest regulation of expression. Indeed, appellee insists the statute should not be limited by the actual malice test of *New York Times Co.* v. *Sullivan,* 376 U. S. 254. It is also claimed that the real-life connection drawn by appellant's publication somehow falls outside the scope of First Amendment protection.

We thus repeat our demand that the award be overturned as a substantial restraint upon expression. The publication, including its references to the real-life incident, constituted a non-defamatory discussion of public issues; as such it should be protected by a constitutional standard of actual malice.

ARGUMENT

1. *Truth.* It is clear from the analyses set forth in the opposing briefs that, literally, the truthful presentation of newsworthy items is actionable in New York. This is plainly

so, in answer to part of the Court's first question, when viewing the language of the statute on its face. Appellee seems to concede the vulnerability of the statute to this form of attack, by arguing that the statute has received a narrowing construction "from the outset" (p. 8). *Cf. Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87.*

Moving to the "as construed" argument, appellee claims that New York's narrow construction has consistently permitted a news exemption while never imposing liability for truthful accounts (pp. 8-12). The principal decision in this regard is *Blumenthal* v. *Picture Classics, Inc.*, 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), *aff'd no op.*, 261 N. Y. 504, 185 N. E. 713 (1933). After ignoring that case throughout the briefing and oral argument last Term, appellee finally discusses it by resort to facts purportedly contained in the record though not mentioned in the opinion of the Appellate Division—or in the recent Court of Appeals opinion in which the facts of the case are discussed in detail. See *Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 360, 107 N. E. 2d 485 (1952). Appellee emphasizes that professional "comics" played roles in the motion picture challenged in *Blumenthal* and made "ethnic comments" and "gags" as various persons and places in New York City were filmed (p. 11). Whatever may be the significance of these record facts (apparently taken from the complaint), there is absolutely no support for the concluding comment in the brief that the photographic close-up

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*The *amicus curiae* argues that the statute is valid even on its face because of the supposedly limiting words "for advertising purposes or for purposes of trade," pointing to the context in which the statute was enacted (pp. 4-5). Since the Court has repeatedly and realistically recognized that profit motives of news and book publishers are constitutionally irrelevant, *e.g.*, *Ginsburg* v. *United States*, 383 U. S. 463, 474, and since the context in which the New York statute was enacted involved the public reaction to deliberately false advertising endorsements, *e.g.*, *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902), the argument is without merit.

of Mrs. Blumenthal was "coupled with a derisive commentary" (p. 12).*

In any event, since the opinions have not relied on any of the "facts" intuitively put together in appellee's brief, it remains beyond dispute that truthful accounts will be actionable wherever the courts object to the manner of presentation. The objection in *Blumenthal* was that the plaintiff was singled out and photographed for some six seconds in nine feet out of a total length of 1,550 feet of film. 235 App. Div. at 572-73 (dissenting opinion); 304 N. Y. at 360. The "common sense principle" of the decision can scarcely be that "private persons on the public streets are not commercial props" (brief for appellee, p. 12), because Mrs.

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*Appellee's fanciful descriptions of the facts in *Blumenthal* are another example of how simple it is to conjure up "fictionalization" without factual support. It is illuminating to compare those descriptions with the conclusions of the two dissenting judges who viewed the motion picture in which Mrs. Blumenthal appeared (235 App. Div. at 572)—conclusions that are not disputed in the majority opinion nor in the subsequent *Gautier* opinion approving the result:

> "It is further shown that at no time does plaintiff's picture appear alone, but on the contrary the pictures of other individuals appear to the side, in front or in back of her. In no part of the picture, either by sound, title, subtitle or otherwise, is any reference whatever made to her or any of her actions or motions and nothing whatever is reproduced to emphasize her likeness, occupation or actions, other than the usual silent reproduction of life and events in that particular quarter of the city.
>
> "It is further shown that at no time in the picture is plaintiff depicted in a foolish, unnatural or undignified manner, nor is there any tendency to hold her up to public ridicule or contempt. There is no distortion or exaggeration of the natural and normal physical conditions which obtained or of the events portrayed. . . .
>
> "The parties posing as guides and school teachers engage in a dialogue which consists largely of merely announcing the places, buildings, etc., in the sections through which they pass, but there is no statement or announcement in the dialogue billing or otherwise referring in any manner to the picture of the plaintiff." 235 App. Div. at 573.

Blumenthal was plying her trade on the public way and was obviously an indigenous part of the local scene on Orchard Street.

Similarly, the objection to *Redmond* v. *Columbia Pictures Corp.*, 253 App. Div. 708, 1 N. Y. S. 2d 643 (1st Dep't 1937), *aff'd no op.*, 277 N. Y. 707, 14 N. E. 2d 636 (1938), and *Franklin* v. *Columbia Pictures Corp.*, 246 App. Div. 35, 284 N. Y. Supp. 96 (1st Dep't 1935), *aff'd no op.*, 271 N. Y. 544, 2 N. E. 2d 691 (1936), appears not to be that the treatment of the plaintiffs' activities was inaccurate but rather that it was humorous and that "humorous commercial movies" (brief for *amicus curiae*, p. 6), are somehow different from newsreel commercial movies of the same activity.

When it comes to the cases that are basically true, their strained treatment in the opposing briefs is the best proof of our point. In *Binns* v. *Vitagraph Co. of America*, 210 N. Y. 51, 103 N. E. 1108 (1913), the only inaccuracy consisted of a single scene from the motion picture in which the protagonist, a public hero, apparently was shown to be grinning. See *Molony* v. *Boy Comics Publishers, Inc.*, 277 App. Div. 166, 173, 98 N. Y. S. 2d 119 (1st Dep't 1950). In *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950), not even a single misstatement was identified yet the case was allowed to go to the jury on the plaintiff's conclusory allegation that the dominant impression created was not a true representation of the facts. These cases show how little it takes for a judicial finding of fictionalization:

> "... In the case before us the series of pictures were not true pictures of a current event [a recent collision at sea] but mainly a product of the imagination, based, however, largely upon such information [from newspaper accounts] relating to an actual occurrence as could readily be obtained...." *Binns* v. *Vitagraph Co. of America*, *supra* at 56.

That statement by the court in *Binns* has generated much of the difficulty with the fictionalization concept in New York. By definition, all dramatic works based on current or historical events, plays, films, novels, telecasts, and the like, make use of imagined dialogue and descriptions. A MAN FOR ALL SEASONS is an example.* Even in such a scholarly historical work as THE ARMADA (1959), Professor Mattingly included dialogue that could only have been drawn from his imagination. A colorful and imaginative biography is Catherine Drinker Bowen's THE LION AND THE THRONE (1956). Schlesinger, in I THE AGE OF ROOSEVELT, CRISIS OF THE OLD ORDER, 1919-1933 (1957), describes very recent history interpretively and with embellishment. See also *Donahue* v. *Warner Bros. Pictures, Inc.*, 194 F. 2d 6, 19-21 (10th Cir. 1952) (dissenting opinion). Nevertheless, beginning with *Binns*, where an event was dramatized within days after its occurrence,** the New York courts have expressed a willingness to impose liability merely because a person's name is mentioned in connection with a dramatization of the news.

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*The following passage can be admired by those who believe in a regime of law and in concepts of equal justice; yet we doubt it was ever uttered by Thomas More or by anyone else in the sixteenth century. It movingly conveys part of the play's theme, however, that Thomas More tried to live by the law (as he tried to live by his conscience, too):

> ". . . Oh? And when the last law was down . . . and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." BOLT, A MAN FOR ALL SEASONS 56 (Samuel French ed. 1960).

**The assertion by counsel for appellee on oral argument last Term that New York exempts inaccurate accounts of current news is supported by no decision known to us and is expressly contradicted by *Binns*.

Two justices of the Appellate Division have spelled out this very point so that it is incapable of being misunderstood:

> ". . . The production was undoubtedly based on an actual occurrence in which plaintiff admittedly participated. Furthermore, the incident depicted was an event of historical import. On the other hand, the production was fictionalized in that the dialogue, the settings, and the appearance, expression and gestures of the actors were all the result of the imagination of the writers and the producers of the presentation. This was a use of the plaintiff's name for the purposes of trade, admittedly without his permission. . . . The immunity granted in respect to informative matter does not extent to dramatized or fictionalized versions of the event reported. . . ." *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 19 App. Div. 2d 865, 244 N. Y. S. 2d 1 (1st Dep't 1963) (concurring opinion).

Appellee attempts to rebut this most recent statement of New York law by pointing out that it represents only the view of two justices of the Appellate Division (Eager and Steuer, JJ.). But when their views are added to those of their Brother Rabin, whose remarkable statement in this case has already been adopted by the Court of Appeals, they cannot be lightly dismissed. More important, the concurring justices were willing to grant the plaintiff relief without the intervention of a jury solely because of this inevitable dramatization. The majority did not write an opinion but merely held, in effect, that the defendant was entitled to take its case to the jury on the question of accuracy—which is just what later occurred (App. 48). Thus, the admittted assassin of Rasputin came within one vote of a virtual judgment on the pleadings because the television description of the actual

event, drawn from several historical texts (App. 51), contained imaginary dialogue, gestures, etc. In the face of *Youssoupoff* (and for that matter *Sutton* v. *Hearst, supra*), the *amicus curiae* nevertheless asserts (p. 8) that where newsworthiness and truthfulness are apparent as a matter of law the case will not be submitted to the jury!

On the question of standing, both opposing briefs essentially take the position that the exception to the judicial rules as to standing is available only to certain litigants such as civil rights groups. Support for this unusual doctrine, says appellee, stems from the operation of the New York statute which is "completely unrelated to any area of political or social controversy" (p. 14). But this cannot be so when the statute by its terms and as construed applies to all publishers in the state and to all publications containing a name or likeness without consent where the account is inaccurate, sensational, or dramatized. Appellee goes on "there is not a scintilla of evidence that the threat of sanctions has ever had any deterrent effect whatsoever on the exercise of First Amendment freedoms" (p. 15). It is impossible, of course, to assess the inhibitory effect of such decisions as *Binns, Blumenthal, Sutton, Youssoupoff,* and the one at issue here, and it is rare when the likes of the Profumo Affair come to public attention in such a way as to make crystal clear that press timidity had actually bottled up news for some time. In any case, there is no evidence that publishers are more immune to harassment than any "politically unpopular group" (p. 14) or that the unpopular causes of the latter cannot be visited upon the former. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266, 271.

The *amicus curiae* argues (p. 11) that appellant's standing should be restricted in this case because the amended remittitur of the Court of Appeals indicates the constitutional issue was drawn in question only as applied.

Apart from the standing exception, which we submit is applicable here as explained in our main brief (pp. 7-10), the amended remittitur must necessarily be deemed to have included consideration of an attack on the overbreadth of the statute because the Court of Appeals upheld the validity of Section 50 of the Civil Rights Law, the companion criminal section. As the opposing briefs themselves pointed out last Term, this case is very definitely not a criminal prosecution. In order to uphold the validity of the criminal statute, therefore—which it did over vigorous objection by appellee that Section 50 was not involved—the Court of Appeals must have passed on the validity of both sections as written. Presumably it did so because it recognized that, the liability-creating words being the same in both statutes, an indictment could be returned by virtue of its decision under Section 51, and appellant could be convicted under the adopted alternative holding of Mr. Justice Rabin even if the second jury were to find the LIFE article entirely accurate.

Thus, the portion of the concurring opinion in the Apellate Division quoted in the Court's second question is a further ground for recognizing appellant's standing to challenge this application of New York's privacy law. The opposing briefs concede that the Court of Appeals adopted the concurring opinion as its own, arguing only that the portion quoted constituted a "dictum." However the statement might conceivably be characterized, it has to be part of the present New York law because it is the only conclusion of law in the concurring opinion distinguishable from the majority opinion. It is an unusual case when the Court of Appeals will adopt a lower court opinion, and rare when it will adopt two lower court opinions in tandem; hence the conclusion is inevitable that the Court of Appeals chose to adopt the distinguishing feature of the concurring opinion

as an alternative holding.* Because the purported error in the LIFE article was so slim, that is, "re-enacted" instead of "reminiscent of," "similar to," or "inspired by," it is probable the Court of Appeals wanted to bolster the majority opinion by the alternative holding that the article was actionable even if entirely true, under Mr. Justice Rabin's hypothesis that the primary rather than incidental reference to the Hills converted the piece into a bit of sensationalism and thus solely an effort to increase circulation (R. 442).

2. *Fictionalization.* Appellee's analysis of the New York doctrine of "fictionalization," this Term and last, is derived from Webster's Third International Dictionary and not from the privacy law of New York. It is argued the concept necessarily includes intent to make false statements because of Webster's definition of "fiction." As we said in our main brief (p. 25), the label "fictionalization" as a matter of first impression might in some cases connote intentional tampering with facts, but it has not been so invoked by the New York courts which have limited themselves to a mechanical examination to the publication at issue—the end product. See Note, 51 MICH. L. REV. 762, 764-65 (1953). Appellee is unable to cite a single opinion in which the question of intent is discussed much less required as an element of the tort. Indeed, the only case containing a specific discussion of intent is *Thompson* v. *Close-Up, Inc.*, 277 App.

*The dissenting opinion in the Appellate Division also followed an unusual course when it responded to the concurring opinion as well as to the opinion of the court. As regards the former, Presiding Justice Botein's response was directed to the portion of the concurring opinion quoted by this Court in its second question, squarely posing the issue of liability for truthful accounts for the Court of Appeals (R. 444). That court decided to take a stand on the issue by adopting the concurring opinion notwithstanding the dissent. Judge Fuld's dissent, in turn, concluded by quoting precisely this dissenting response to the concurring opinion (R. 455).

Div. 848, 98 N. Y. S. 2d 300 (1st Dep't 1950), where the court stated unequivocally that liability could rest upon a mistake. The attempt to distinguish that case (brief for appellee, p. 21) is, at least to us, incomprehensible.

Principal reliance is placed upon *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 260 N. Y. S. 2d 451 (1st Dep't 1965), cited repeatedly in appellee's brief (13, 19-20, 22, 23). That opinion, however, does not support the suggested definition of "fictionalization." Instead, it appears *in fact* to have involved deliberate misstatement. Again, this merely underscores what we have said before (*e.g.*, main brief, p. 3), that a number of the New York cases undoubtedly involved deliberate falsification and hence were rightly decided, albeit unwittingly, under the First Amendment. Moreover, appellee has overlooked the concluding statement of law contained in the *Spahn* opinion:

> ". . . . If the publication, however, by intention, purport, *or format,* is neither factual nor historical, the statute applies, and if the subject is a living person his written consent must be obtained." 23 App. Div. 2d at 222. (Emphasis added.)*

What appellee has attempted to do here is to create a presumption: the word "fictionalization" sounds like it includes deliberate fiddling with the facts and, anyway, on what other basis could a publisher print misstatements when his design is to increase circulation? Such a presumption, of course, would have to be grafted upon the already existing legal presumption in New York that is just as fallacious—that certain newspaper and magazine items are

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*The only other decision cited by appellee to support his definition is *Binns* v. *Vitagraph Co. of America, supra,* where intent was not discussed and the defendant readily testified that its scenario was based on all the newspaper accounts it could find reconstructed with the aid of the imagination. 210 N. Y. at 56.

designed to increase circulation and profits and others are not. (The criteria of "trade purposes" have obviously been the result of the statutory language, originally drafted with the false endorsement situation in mind. How the existing presumption could be applied in any event to the facts of this case, where the article appeared on page 75 of the particular issue of LIFE and was not mentioned on the magazine's cover, remains a mystery.)

Appellee's new presumption—that "fictionalization" denotes intentional falsification—is analogous to the common law presumption of malice in defamation, previously rejected by the Court in *New York Times,* 376 U. S. at 283-84. It is particularly inapt in the context of privacy because, as the present case illustrates, the publisher will have less reason to be on guard. A defamatory falsehood, whether or not he is aware of its falsity, is a red flag to the publisher to proceed cautiously. Here, on the other hand, we find a laudatory publication on a subject that had already been discussed prominently in the press just a few years before. And non-defamatory language about public issues would seem to be just as important, if not more important, than defamatory language about the conduct of second-rank public officials; presumptions should be as objectionable in the one case as in the other.

The most troublesome feature of appellee's presumption* is found in the context of the present case and, specifically, the state of mind of the LIFE editor. That is a subject receiving scant attention in the opposing briefs, no attention at the trial, and only a passing reference (by way of implying

*The *amicus curiae* appears to recognize as well that appellee's argument is grounded on a presumption when he speaks of a finding of fictionalization based on inferences, "the greater the departure from truth, the stronger the inference" (p. 16). Moreover, in another section of his brief (p. 29) appellee argues that "there is no basis for application of the *New York Times* test of actual malice . . . to the New York statute. . . ."

carelessness) in the majority opinion of the Appellate Division. Viewed in the light least favorable to appellant, the facts here at the very least support a reasonable claim of good faith. Confronted with such a claim, trial counsel for appellee made no effort to rebut it and no effort to cross-examine the LIFE editor with regard to his state of mind, and, indeed, objected when counsel for appellant attempted to raise the subject with the same witness and in summation (R. 246, 530).

Most of appellee's belated claim of intentional fabrication is founded upon an article written by Hayes, entitled "Fiction Out Of Fact" and introduced at the trial by appellant, in which the author said THE DESPERATE HOURS was based on four news stories, one the Hill incident (R. 382-85). (No mention is made of another article written by Hayes in which he noted that THE DESPERATE HOURS was based on two news stories, the Hill incident and another quite different occurrence in New York, R. 143-44, 427-28.) Surely this is an inadequate ground for a determination of intentional falsehood or reckless disregard as a matter of law, in the absence of pertinent jury instructions and in the absence of evidence tending to show the LIFE editor was specially aware of the Hayes article or believed it to be in any way inconsistent with his own. See *New York Times Co.* v. *Sullivan, supra* at 287-88. In addition, it ignores the other examples of good faith, *e.g.*, the connection made by the Philadelphia reviewers, the similarities between the play and the event, the unusual two-story stage setting, and the arrangements made by Hayes himself for the off-stage photographs at the Hills' former home. If Hayes did not approve of a substantial connection being drawn between his play and the Hills when he assisted in taking photographs of scenes from the play in the actual home, then his conduct was deceitful to say the least. In view of his conduct, there was no reason for the LIFE editor to question him in

detail about the real-life connection and, in any event, the failure to do so under the circumstances can at most be deemed negligent, precisely the implication of the majority opinion in the Appellate Division (R. 439).*

The instructions to the jury in this case are just as barren of reference to intentional misstatement as is appellee's definition of "fictionalization." Except on the final question of punitive damages, put to the jury on an alternative theory of negligence, that is, failure to make a reasonable investigation, the charge is silent on state of mind and standard of care. It can only follow that the instructions dealing with compensatory damages, which do not even contain a negligence criterion, permitted a verdict for non-negligent or, at the most and only by implication, negligent, misstatements. It follows even more inexorably in light of appellant's sixth request to charge which specifically contained a requirement that the jury find knowledge of falsity (R. 311).

Appellee still insists (pp. 26-27) that the court included a standard of recklessness on the question of punitive damages. But a reckless disregard of "plaintiff's rights" (R. 566) simply does not satisfy the actual malice test. Indeed, in *Rosenblatt* v. *Baer,* 383 U. S. 75, 84, even an "intention to injure" was held to be "constitutionally insufficient where discussion of public affairs is concerned." Furthermore, in the context of this statute, a reckless disregard of the plaintiff's rights can only mean that the defendant went ahead and knowingly published the plaintiff's name without first ob-

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*The Appellate Division appeared to overlook the testimony concerning the initial conversation between Hayes and the LIFE editor (which followed, in turn, the conversation between the latter and Hayes' friend, Bradley Smith, when the "substantial connection" to a family in the Philadelphia area was disclosed, R. 173-74, also 144). Hayes confirmed, in answer to a specific question, that there had been a similar incident in Philadelphia. He then agreed to contact the occupants of the house at the site of the incident for the purpose of photographing scenes from the play there (R. 108, 145).

taining his consent (*e.g.*, R. 304). Appellant's knowledge that it lacked consent, conceded from the outset, can hardly be equated with knowledge of falsity or reckless disregard of the truth or falsity of statements of fact.

Appellee attempts to draw support from the language in this and the *Youssoupoff* charge relating to alteration of the true facts. Unfortunately, in his paraphrase of those instructions (pp. 22, 24) appellee has left out the key words "as published" in the charge here and ignored the words "as televised" in *Youssoupoff* (R. 300, 307; App. 48).* Again, appellee moves from the actual words used in the instructions to his own definition, "alteration or changing of facts to create fiction" (p. 22) and "alteration of facts to create a fiction" (p. 24). Whatever may be the meaning of this rather ambiguous definition, it was not invoked by the trial court here or in *Youssoupoff*. The focus in both was on the end product. If the LIFE article or the television program contained something more than incidental misstatements, the jury was obliged to find fictionalization. The New York Times, it should be remembered, "altered or changed the true facts" when it published an advertisement containing misstatements. See 376 U. S. at 286-87.

Finally, the significance of the failure to explore the subject of good faith and the trial court's silence on that subject in its charge can only be fully apprehended upon an examination of what it is that appellant did. If this were a case of a "hoax executed with painstaking preci-

*The paraphrase of the key portion from the *Youssoupoff* charge is particularly revealing. Appellee states the jury was required to find "that the *defendant* 'altered or changed the true facts concerning the plaintiff's relationship to the events of Rasputin's death so that the play as televised constituted substantial fiction or a fictionalized version of what actually did take place'" (p. 22) (emphasis added). Actually, the charge permitted a finding of liability if "the *television program* 'If I Should Die' altered or changed the true facts. . . ." (App. 48) (emphasis added).

sion," perhaps the failure to discuss intent would not be so important. In fact, appellant's article contained a single error, and an ambiguous error at that. Every word in the account is literally true both in terms of its faithfulness to the play and its faithfulness to the real-life connection. The author testified that the Hill incident triggered THE DESPERATE HOURS in a very direct way (R. 129-30, 151); the thrust of the article is that the play was inspired by the actual event and that word is used twice in the article, the first time, most significantly, in the headline ("TRUE CRIME INSPIRES TENSE PLAY") (R. 15). Only in one sentence out of the entire article is there a possible inaccuracy where the word "re-enacted" may suggest that the play constituted a reenactment of the Hill incident, although the reference more probably is to the novel being reenacted in play form:

> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their home outside of Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes's novel, *The Desperate Hours,* inspired by the family's experience. Now they can see the story re-enacted in Hayes's Broadway play based on the book, and next year will see it in his movie, which has been filmed, but is being held up until the play gets a chance to pay off." (R. 15.)

Moreover, and apart from the ambiguity, the error is only substantial if we must assume that "re-enacted" necessarily means a documentary-like reproduction of what actually occurred. That interpretation, of course, does not at all jibe with the thrust of the remainder of the article where the emphasis is upon "inspired" rather than "re-enacted." Similarly, the captions accompanying the photo-

graphs taken at the Hills' former home (as well as the text of the article) refer to the actors having been transported from the stage to do scenes from the *play* (*e.g.*, R. 16). The captions and text might have instead read "where scenes from the *crime* were re-enacted" but they did not. The purported misstatement of fact is limited, but even if considered substantial, there was absolutely no evidence to show that appellant had any ulterior motive for its ambiguous use of the word "re-enacted" as distinguished from a repetition of the word "inspired," or that the substitution of the latter word would have made the total article any less interesting or destined to sell fewer copies of the magazine. Nor was there any attempt to explore *why* (as opposed to *whether*), in the editorial revision process, the words "somewhat fictionalized" were deleted from an earlier draft, so that one is left with the impression that the change was approved because of the obvious tautology in a review of a melodramatic work that is nowhere described as a documentary.*

3. *First Amendment.* The opposing briefs offer no constitutional criteria of their own by which to measure the New York statute; they contend that the status quo should not be altered because most of the New York cases have been decided on equitable if not constitutional grounds. They argue that the statute is a regulatory measure, reasonably worded and reasonably applied, to protect an individual's feelings at no loss of information to the public (*e.g.*, brief for appelleee, pp. 27-28). That description hardly fits the whimsical and capricious operation of the statute. For

*Actually, the LIFE editor on cross-examination attempted to explain before he was interrupted that all dramatic works are fictionalized (R. 201). Compare the Herald Tribune review of INHERIT THE WIND, described as a "semi-documentary" despite the fictionalization of characters, dialogue, and setting. N. Y. Herald Tribune, April 22, 1955, p. 10, col. 1.

example, the Hills would have been equally disturbed if the article had been the same except to say the play was reminiscent of their incident (R. 441). And, had the article been so worded, the pictures taken at their former home would not have been enough to sustain liability under the majority opinion (unlike the concurring opinion) in the Appellate Division. On the other hand, as written, the article is actionable because of the erroneous word "re-enacted"; hence it would make no difference if there had been no pictures at all in the article or if the pictures had been confined to the stage. The "name" limitation is another example of the arbitrary nature of the statute. Here the Hills' ire was originally directed at Hayes, the one most familiar with the facts and the one who had originally connected them with THE DESPERATE HOURS (R. 278-86), yet liability was avoided only because "Hill" became "Hilliard."

As we have shown in some detail, and as conceded by counsel for appellee at the oral argument last Term, the substitution of a single word would have saved the article and made it, according to the New York courts, newsworthy and within their news exemption. But the article's importance is scarcely diminished because it contained the verb "re-enacted" instead of another verb merely suggestive of strong similarities between the play and the incident. The point of the article would remain the same.

Nor does it make much sense, in a constitutional context, to rely on the doctrine that what is familiar is what is right. Although the New York statute has been abroad for some sixty-three years (brief for appellee, p. 16n.), as of 1964 most of the state criminal libel laws had been extant much longer. See *Garrison* v. *Louisiana*, 379 U. S. 64, 70n.7. FANNY HILL, recently found to be constitutionally protected unless *utterly* without redeeming social importance, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure* v.

Attorney General of Massachusetts, 383 U. S. 413, 418-20, was first suppressed in the United States nearly 150 years ago. See 383 U. S. at 425n.1 (concurring opinion).

The opposing briefs repeatedly point out that "incidental mistake" is not enough to incur liability in New York and that the instructions here included that statement of New York law (R. 301). We could not have demonstrated the harshness of this strict-liability statute any more vividly ourselves. A test that warns a publisher to print anything save incidental mistake at his peril is plainly deficient.

It has already been established that "no matter how gross the untruth," even when defamatory, the possibility remains that the statement may have been honestly uttered. See *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (concurring opinion). By contrast, we have here a statute that feeds on anything other than incidental mistake in a non-defamatory report and without inquiry into the publisher's state of mind or what he had reason to believe. But the awards under the statute have been modest, says appellee (p. 33), overlooking the original judgment here of $175,000 in punitive as well as compensatory damages (R. 308). The ultimate award ($30,000) was such smaller, because of the "substantial prejudicial error" in allowing the jury to view the film version of THE DESPERATE HOURS and other inflammatory material (R. 439-40) and because upon remand the action was discontinued as to Mrs. Hill (R. 446-47). At no time in this case have the New York courts said or suggested that an award of punitive damages was impermissible, and the trial judge upon remand was free to enter such an award.

Finally, the opposing briefs advance no "compelling" need why the statute should be permitted to continue unchecked under its present construction. See *Bates* v. *City of Little Rock*, 361 U. S. 516, 524. They merely point to cases that involved intentional fabrication as a matter of fact,

such as *Spahn, supra,* in which knowledge of falsity was conceded, or where the particular lower court reached a correct result, for example, *Koussevitzky* v. *Allen, Towne & Heath, Inc.,* 188 Misc. 479, 68 N. Y. S. 2d 779 (Sup. Ct.), *aff'd no op.,* 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947). Nor do they explain why Utah, one of the two states having a statute almost identical to New York's, has, under the First Amendment, expressly rejected the results of such New York decisions as *Binns* and *Blumenthal* and limited its privacy law primarily to cases of false endorsements.* See *Donahue* v. *Warner Bros. Pictures Distrib. Corp.,* 2 Utah 2d 256, 272 P. 2d 177 (1954). The *Donahue* decision of the Utah Supreme Court provides a guidepost for this Court comparable to that furnished for the *Times* decision by the Kansas Supreme Court in *Coleman* v. *MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908). The Utah court, in construing a statute nearly identical to the one now drawn in question, articulated constitutional premises very like those advanced by appellant. See 272 P. 2d at 183-84.

Turning to the constitutional test suggested by appellant,** the opposing briefs indicate that the discussion at stake here did not involve a public issue. Essentially their

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*The other state is Virginia whose privacy statute, VA. CODE ANN. § 8-650 (1957), has received virtually no interpretative gloss. See Woodbridge, *Some Needed Changes in the Tort Laws of Virginia,* 3 WILLIAM & MARY L. REV. 3, 4 (1961).

**Appellee misconceives the scope of the test proposed in our main brief. It is not a standard limited to criteria of "redeeming social value" (brief for appellee, p. 30). We cited the language of the obscenity cases merely to show the outer limits of constitutional protection. As the Court has already made clear, criticism of government is "at the very center of the constitutionally protected area of free discussion." *Rosenblatt* v. *Baer, supra* at 85. The subject of appellant's publication may not have been at the very center of free discussion, but unquestionably it was closer to the center than to the outer fringes.

argument runs that the First Amendment only protects criticism of official conduct and that, in any event, the LIFE article could not be considered part of a "debate" on public issues (brief for appellee, p. 31n.; brief for *amicus curiae*, pp. 18-19). Appellee does not spell out this rather parochial view of debate, but it is apparently limited to an exchange between two individuals either face to face or in print. Such a view excludes the possibility of an artistic contribution to public debate and a reviewer's commentary on that contribution.

While not exploring the significance of drawing a real-life parallel, the opposing briefs suggest that there is no substantial public interest in learning of such a connection. (They convey this idea without actually saying it—perhaps out of understandable lack of conviction.)

The opposing briefs seize upon a bit of journalistic jargon—"gimmick"—in the testimony of the substitute researcher who worked on the article for a short time (R. 161-64), not, as the opposing briefs would have one believe, from the words of the LIFE editor. The "gimmick" of tying the review to the Hills, on whose story the play was actually based, was an attempt to convey through the medium of photo-journalism some of the message of Hayes' play. So often the difficulty in artistic communication stems from its lack of verisimilitude, from its inability to relate to meaningful events of the day. Where a connection to a real-life event or person exists, journalists and reviewers almost invariably point it out. Arthur Miller's play, AFTER THE FALL, powerfully chronicled the self-destruction of a young woman. The review in every major New York paper linked the play to

Marilyn Monroe.* Even after Miller denied the play told the story of his former wife,** the critics continued to see Marilyn in "Maggie."*** Miller's first wife, Mary Slattery

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*"As everyone must surely have heard long before this, much of the play is based on the dramatist's marriage to Marilyn Monroe. . . ." N. Y. Post, Jan. 24, 1964, p. 59, col. 1.

"Actually, there are no unimportant relationships. The most vivid, of course, is Quentin's second marriage, to a highly successful popular singer who is inescapably Miller's second wife, Marilyn Monroe." N. Y. World-Telegram and Sun, Jan. 24, 1964, p. 16, col. 5.

"The author is one of our most gifted playwrights, but it seemed regrettable that he chose to consider at such length the tragic frustrations of a character, quite obviously fashioned after Marilyn Monroe, which led to her suicide. . . ." N. Y. Journal-American, Jan. 24, 1964, p. 20, col. 1.

"The less important reason is its patent use of the author's relationship with the late Marilyn Monroe. We are given no cause for doubt here, not in calling her Maggie or in describing her as a cabaret singer. . . ." N. Y. Herald Tribune, Jan. 24, 1964, p. 11, col. 1.

". . . . The long, searing relation between Quentin and Maggie, the sexy, popular entertainer, who inescapably will be equated with Marilyn Monroe, is described with the tenderness and anguish it meant for both." N. Y. Times, Jan. 24, 1964, p. 18, col. 2. See also Daily News (N. Y.), Jan. 24, 1964, p. 49, col. 1.

**". . . . The character of Maggie, who in great part seems to underly the fuss, is not in fact Marilyn Monroe. . . .

". . . . I would only say now that despite appearances, this play is no more and no less autobiographical than *All My Sons, Death of a Salesman, The Crucible* or *A View from the Bridge*. . . ." Miller, *"With respect for her agony—but with love,"* Life, Feb. 7, 1964, p. 66.

***". . . . Although Mr. Miller does not want us to regard the play as biographical, its events so resemble what the public knows of the playwright's own life that it becomes difficult for us not to believe that we are seeing exactly what went on behind the closed doors. Take the instance of Quentin's marriage to Maggie, the sex-generous star who eventually dies from an overdose of barbiturates. Can one not regard her as the late Marilyn Monroe, who was Mr. Miller's second wife, particularly since, after a brief first-act appearance as a quite different-looking girl, Miss Loden switches in Act II to something that it as much like Marilyn's public image as she can possibly make her? . . ." Saturday Review, Feb. 15, 1964, p. 35.

"Another part has to do with Miller's marriage to Marilyn Monroe. . . ." The Reporter, Feb. 27, 1964, p. 46.

(not a public figure), and Elia Kazan, who had directed the play, were also mentioned in commentary about it.* Edwin O'Connor, like Miller, denied his novel, THE LAST HURRAH, told the story of James M. Curley: "I know very little about Mayor Curley. My man is far different." Saturday Review, Feb. 4, 1956, p. 12. But Howard Mumford Jones, reviewing the novel on the same page in the Saturday Review where O'Connor's disclaimer appeared, playfully but clearly identified the Irish Mayor in O'Connor's book: "J-m-s M-ch- -l C-rl-y." *Ibid.* Similarly, INHERIT THE WIND was commonly discussed as the story of Bryan and Darrow at the Scopes trial.** Even WINTER-

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*Many theatregoers have found similarities in the lives of the characters on stage and in Mr. Miller and the people in his life.

". . . .

". . . . [Mr. Miller's] first wife was Mary Slattery. . . . They were divorced in 1956. That year Mr. Miller married Miss Monroe. . . ." N. Y. Times, Jan. 31, 1964, p. 14, cols. 1, 3.

". . . . Some of the more juicy turns in this exhibition include his arguments with his parents, and his mother's emasculation of his father; his quarrels with his first wife over her coldness in bed and his suspected infidelities; his continuing loyalty to his ex-Communist friends, one of whom throws himself under a subway train; his break with Mickey (Elia Kazan) over the latter's decision to name names to a Congressional committee; his affair, marriage, and tortured life with Maggie (Marilyn Monroe), concluding with her suicide; and, finally, his decision to build a new marriage with Holga, a German woman he met abroad." The New Republic, Feb. 8, 1964, pp. 26-27.

**"Because of legal niceties, I suppose, the place, characters and time of the drama are fictionalized, so that Muni appears as a character named Henry Drummond and Begley is called Matthew Harrison Brady. But Muni and Begley are, of course, Clarence Darrow and William Jennings Bryan, and the events at the National Theatre are a representation of what happened when these two notable men clashed in the historic Scopes 'monkey trial' in Tennessee." Daily News (N. Y.), April 22, 1955, p. 59, col. 1.

"In 'Inherit the Wind', the semi-documentary play that Jerome Lawrence and Robert E. Lee have based on the Scopes 'monkey trial' of 1925, Mr. Muni has one of those parts that actors have been known to hock their wives and children for." N. Y. Herald Tribune, April 22, 1955, p. 10, col. 1.

SET, Maxwell Anderson's prize-winning verse play about the son of an executed anarchist and his quest to establish his father's innocence, evoked reviews grounding the play in the far-different Sacco-Vanzetti incident.* Reviewers at a revival thirty years later made the same link.** Connections are sometimes made by photographs as well. Martin Dain's collection, FAULKNER'S COUNTY (1963), combines pictures of places and people in northern Mississippi with paragraphs from Faulkner's novels about Yoknapatawpha County.

In each of these examples the writer or photographer used the "gimmick" of tying a dramatic work to a real-life person or event. By this "gimmick" these writers, along with the LIFE editor, were not perpetrating a "hoax executed

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* "In 'Winterset' Mr. Anderson has not only turned his back on the tragedies of the Tudors but given vent in poetic form to some of that resentment which the Sacco-Vanzetti case left smoldering in his heart and which he stated in prose with Harold Hickerson's aid in 'Gods of the Lightning.'" N. Y. Post, Sept. 26, 1935, p. 12, col. 1.

". . . . (There is here an echo of the Sacco-Vanzetti case, but Mr. Anderson's purpose is not this time political protest, as it was some years ago in 'Gods of the Lightning,')" N. Y. Sun, Sept. 26, 1935, p. 28, col. 1.

" . . . . Obviously its main impulse springs from that old bitterness over the Sacco-Vanzetti case, only here he reaches beyond the immediate facts in a quest for the truth of justice, and takes for his narrative outline the attempt of a young man, who believes his executed father innocent, to find vindication." N. Y. Evening Journal, Sept. 26, 1935, p. 18, col. 1.

"Maxwell Anderson's 'Winterset', I think, must be the tragedy of Vanzetti's son. Or Sacco's son. Not as it happened, but as such a son's life might have been visioned by a poet-dramatist who was very deeply stirred by the case of Massachusetts against those men." Daily News (N. Y.), Sept. 26, 1935, p. 59, col. 1.

". . . . Newspaper headlines flash by, there are street discussions, it is the Sacco-Vanzetti case in thin disguise." N. Y. Times, Dec. 4, 1936, p. 31, col. 3.

**"Its basis was the Sacco and Vanzetti case, the rallying point for leftists in the '30s. . . ." N. Y. Journal-American, Feb. 10, 1966, p. 15, col. 6. See also N. Y. Post, Feb. 10, 1966, p. 24, col. 3.

with painstaking precision" but rather were following the natural journalistic instinct to make such works more meaningful to the public. Readers and members of his audience could not lightly dismiss Miller's message about a woman destroying herself when they were told it was based on the life of a real person (although for some reviewers it thereby became somewhat embarrassing, another critical reason they felt for pointing out the connection to Miss Monroe and others in the author's life). In the same way, a LIFE reader might not readily dismiss Hayes' theme that an American family, living in a comfortable suburb, could actually be held hostage for a prolonged period in its own home and yet, through its self-reliance, survive such an ordeal.

We recognize that not all items published in the press are compelled by public interest, for example, gossip for gossip's sake or private defamation. *Cf. Afro-American Publishing Co., Inc.* v. *Jaffe*, No. 18, 363 (D. C. Cir. August 23, 1966) at 11-12. But the publication here did not trade on the Hills' private life; rather it dealt with the one public event in which, apparently, the family had ever been involved. See Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L. J. 642, 648-49 (1966). By comparison, the references to Marilyn Monroe in the reviews of AFTER THE FALL admittedly concerned a public person, but the play which they discussed dealt with intimate details of her private life.

Even in the context of defamation it has already been acknowledged that the free press privilege "must include a very great deal more" than honest attacks on public officials. See Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581, 591 (1964). Professor Pedrick emphasizes that the public judgment requires enlightenment on a multitude of subjects:

"... If a qualified 'good faith' privilege is needed to better assure open debate then the privilege ought to extend as stated by Judge Burch of Kansas to 'all matters of public concern.' The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. It is therefore the function of the first amendment to protect the freedom of speech and press on all those matters as to which there is some element of public participation. At least on those issues where the public judgment can make itself felt through official or unofficial communication it can be said that the matter is one of proper public concern. The determination of 'matters of public concern' should thus become the key to the application of the privilege recognized in the *Times* decision." *Id.* at 592.

In a non-defamatory context the public issue test is particularly compelling. See Note, 12 CATHOLIC LAW. 235, 246-47 (1966), where the Court's third and fourth questions for reargument are discussed and a constitutional privilege for fictionalized, non-defamatory statements about private persons approved. Out of the welter of words used to describe this long and confusing litigation about a non-defamatory publication there remains one simple, incontrovertible fact: a substantial connection existed between the play and the actual event which LIFE was entitled to point out (R. 441). In the absence of intentional fabrication or reckless disregard, we submit that the First Amendment allows and indeed encourages LIFE MAGAZINE to decide for itself how best to report that connection.

The public interest in that reported connection was not morbid, lurid, or prurient, and hence the publication drawing it was not merely "dressed up as speech." See *Ginzburg* v. *United States,* 383 U. S. 463, 474n.17. Appellant's publication contributed to the public judgment about the home and the community, as affected by the far-reaching ramifications of a specific and thoroughgoing crime. It recognized the understandable public interest in learning that something like THE DESPERATE HOURS could actually happen in American life but that, depending upon the persons involved, those desperate hours could be endured and survived:

> ". . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 102.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the main brief for the appellant on reargument and in the briefs for the appellant in No. 562 last Term, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Of Counsel.

October 12, 1966.

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SUPREME COURT OF THE UNITED STATES

No. 22.—October Term, 1966.

Time, Inc., Appellant, v. James J. Hill.	On Appeal From the Court of Appeals of New York.

[January 9, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

The question in this case is whether appellant, publisher of Life Magazine, was denied constitutional protections for speech and press by the application by the New York courts of §§ 50–51 of the New York Civil Rights Law [1] to award appellee damages on allegations

[1] The complete text of New York Civil Rights Law §§ 50–51 is as follows:

"§ 50. *Right of privacy*

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

"§ 51. *Action for injunction and for damages*

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is

that Life falsely reported that a new play portrayed an experience suffered by appellee and his family.

The article appeared in Life in February 1955. It was entitled "True Crime Inspires Tense Play," with the subtitle, "The ordeal of a family trapped by convicts gives Broadway a new thriller, 'The Desperate Hours.'" The text of the article reads as follows:

> "Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their homes outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes' novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes' Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.
>
> "The play, directed by Robert Montgomery and expertly acted, is a heart-stopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were beseiged. On the next page scenes from the play are re-enacted on the site of the crime."

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continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

The pictures on the ensuing two pages included an enactment of the son being "roughed up" by one of the convicts, entitled "brutish convict," a picture of the daughter biting the hand of a convict to make him drop a gun, entitled "daring daughter," and one of the father throwing his gun through the door after a "brave try" to save his family is foiled.

The James Hill referred to in the article is the appellee. He and his wife and five children involuntarily became a front-page news story after being held hostage by three escaped convicts in their suburban, Whitemarsh, Pennsylvania, home for 19 hours on September 11–12, 1952. The family was released unharmed. In an interview with newsmen after the convicts departed, appellee stressed that the convicts had treated the family courteously, had not molested them, and had not been at all violent. The convicts were thereafter apprehended in a widely publicized encounter with the police which resulted in the killing of two of the convicts. Shortly thereafter the family moved to Connecticut. The appellee discouraged all efforts to keep them in the public spotlight through magazine articles or appearances on television.

In the spring of 1953, James Hayes' novel, "The Desperate Hours" was published. The story depicted the experience of a family of four held hostage by three escaped convicts in the family's suburban home. But unlike Hill's experience, the family of the story suffer violence at the hands of the convicts; the father and son are beaten and the daughter subjected to a verbal sexual insult.

The book was made into a play, also entitled "The Desperate Hours," and it is Life's article about the play which is the subject of appellee's action. The complaint sought damages under §§ 50–51 on allegations that the Life article was intended to, and did, give the

impression that the play mirrored the Hill family's experience, which, to the knowledge of defendant " . . . . was false and untrue." Appellant's defense was that the subject of the article was "a subject of legitimate news interest," "a subject of general interest and of value and concern to the public" at the time of publication, and that it was "published in good faith without any malice whatsoever . . . ." A motion to dismiss the complaint for substantially these reasons was made at the close of the case and was denied by the trial judge on the ground that the proofs presented a jury question as to the truth of the article.

The jury awarded appellee $50,000 compensatory and $25,000 punitive damages. On appeal the Appellate Division of the Supreme Court ordered a new trial as to damages but sustained the jury verdict of liability. The court said as to liability:

> "Althought the play was fictionalized, *Life's* article portrayed it as a re-enactment of the Hill's experience. It is an inescapable conclusion that this was done to advertise and attract further attention to the play, and to increase present and future magazine circulations as well. It is evident that the article cannot be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information in which the public had, or might have a proper interest." 18 App. Div. 2d 485, 489, 240 N. Y. S. 2d 286, 290.

At the new trial on damages, a jury was waived and the court awarded $30,000 compensatory damages without punitive damages.[2]

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[2] Initially, appellee's wife was joined in the action, and was awarded $75,000 compensatory and $25,000 punitive damages by the jury. However, her action was apparently dismissed by stipulation prior to remand, because the action has since proceeded solely upon appellee's judgment.

The New York Court of Appeals affirmed the Appellate Division "on the majority and concurring opinions at the Appellate Division," two judges dissenting. 15 N. Y. 2d 986, 207 N. E. 2d 604. We noted probable jurisdiction of the appellant's appeal to consider the important constitutional questions of freedom of speech and press involved. 382 U. S. 936. After argument last Term, the case was restored to the docket for reargument, 384 U. S. 995. We reverse and remand the case to the Court of Appeals for further proceedings not inconsistent with this opinion.

I.

Since the reargument, we have had the advantage of an opinion of the Court of Appeals of New York which has materially aided us in our understanding of that court's construction of the statute. It is the opinion of Judge Keating for the court in *Spahn* v. *Julian Messner, Inc.*, 18 N. Y. 2d 324, 221 N. E. 2d 543 (1966). The statute was enacted in 1903 following the decision of the Court of Appeals in 1902 in *Roberson* v. *The Rochester Folding Box Co.*, 171 N. Y. 538. *Roberson* was an action against defendants for adorning their flour bags with plaintiff's picture without her consent. It was grounded upon an alleged invasion of a "right of privacy," defined by the Court of Appeals to be "the claim that a man has the right to pass through this world, if he wills, without having his picture published . . . or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers . . . ." 171 N. Y., at 544. The Court of Appeals traced the theory to the celebrated article of Warren and Brandeis entitled "The Right to Privacy" published in 1890. 4 Harv. L. Rev. 193.[*] The Court of Appeals however

[*] The various facets of this "right" has been the subject of much comment. See, *e. g.*, Beaney, The Constitutional Right to Privacy in the Supreme Court, 1962 Sup. Ct. Rev. 212; Prosser, Privacy,

denied the existence of such a right at common law but observed that "the legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture of another for advertising purposes without his consent." 171 N. Y., at 545. The legislature enacted §§ 50–51 in response to that observation.

Although "Right to Privacy" is the caption of § 51, the term nowhere appears in the text of the statute itself. The text of the statute appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent.[4] An application of that limited scope would present different questions of violation of the constitutional protections for speech and press. Compare *Valentine* v. *Chrestensen*, 316 U. S. 52, with *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265–266.

The New York courts have, however, construed the statute to operate much more broadly. In *Spahn* the Court of Appeals stated that "Over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its overall purpose . . . ."

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48 Cal. L. Rev. 383 (1960); Westin, Science, Privacy and Freedom: Issues and Proposals for the 1970's (Part I), 66 Col. L. Rev. 1003 (1966); Feinberg, Recent Developments in the Law of Privacy, 48 Col. L. Rev. 713, 717–726 (1948). The latest collection of articles appears in 31 Law and Contemp. Prob. 251–435 (1966). The commentary relates not so much to the assertion of constitutional protections against intrusions by government, see *Griswold* v. *Connecticut*, 381 U. S. 479, as to rights of action for injunctive relief or damages to combat intrusive behavior in the private sector of society.

[4] Utah's statute was modeled on New York's and, following early New York decisions, the Utah Supreme Court has construed it to afford a cause of action only in such cases. *Donahue* v. *Warner Bros. Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P. 2d 177 (1954).

18 N. Y. 2d, at 327, 221 N. E. 2d, at 544. Specifically, it has been held in some circumstances to authorize a remedy against the press and other communications media which publish the names, pictures, or portraits of people without their consent. Reflecting the fact, however, that such applications may raise serious questions of conflict with the constitutional protections for speech and press, decisions under the statute have tended to limit the statute's application.[5] "[E]ver mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest." *Id.*, 18 N. Y. 2d, at 328, 22 N. E. 2d, at 544–545.

In the light of questions that counsel were asked to argue on reargument,[6] it is particularly relevant that the

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[5] See, *e. g.*, *Sidis* v. *F–R Pub. Corp.*, 113 F. 2d 806 (C. A. 2d Cir.), cert. denied, 311 U. S. 711 (1940); *Sweenek* v. *Pathe News, Inc.*, 16 F. Supp. 746 (D. C. E. D. N. Y. 1936); *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 106 N. Y. S. 2d 553 (1951), aff'd 304 N. Y. 354, 107 N. E. 2d 485 (1952); *Molony* v. *Boys Comics Pubs., Inc.*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1950); *Humiston* v. *Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1919); *Colyer* v. *Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (1914); *Koussevitzky* v. *Allen, Towne and Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd 272 App. Div. 759, 69 N. Y. S. 2d 432 (1947); *Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 295 N. Y. Supp. 382 (1937).

[6] "Upon reargument, counsel are requested to discuss in their further briefs and oral arguments, in addition to the other issues, the following questions:

"(1) Is the truthful presentation of a newsworthy item ever actionable under the New York statute as construed or on its face? If so, does appellant have standing to challenge that aspect of the statute?

"(2) Should the *per curiam* opinion of the New York Court of Appeals be read as adopting the following portion of the concurring opinion in the Appellate Division?

" 'However, if it can be clearly demonstrated that the newsworthy item is presented, not for the purpose of disseminating news, but

Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. The opinion states: "The factual reporting of newsworthy persons and events is in the public interest and is protected." 18 N. Y. 2d, at 328, 221 N. E. 2d at 545.[7] Constitutional questions which might

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rather for the sole purpose of increasing circulation, then the rationale for exemption from section 51 no longer exists and the exemption should not apply. In such circumstances the privilege to use one's name should not be granted even though a true account of the event be given—let alone when the account is sensationalised and fictionalised.'" 384 U. S. 995.

[7] This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." *Sidis* v. *F–R Pub. Co.*, 113 F. 2d 806, 809 (C. A. 2d Cir.), cert. denied, 311 U. S. 711 (1940). Cf. *Garner* v. *Triangle Pub., Inc.*, 97 F. Supp. 546, 550 (D. C. S. D. N. Y. 1951); Restatement, Torts, § 867, comment d (1939). See Restatement, *supra*, illust. 6. This case presents no question whether truthful publication of such matter could be constitutionally sanctioned.

It has been said that a "right to privacy" has been recognized at common law in 30 States plus the District of Columbia and by statute in four States. See Prosser, Law of Torts 831–832 (3d ed. 1964). Professor Kalven notes, however, that since Warren and Brandeis championed an action against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him, "it has been agreed that there is a generous privilege to serve the public interest in news . . . . What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?" Kalven, "Privacy in Tort Law—were Warren and Brandeis Wrong?" 31 Law and Contemp. Prob. 326, 335–336 (1966). Some representative cases in which the State "right of privacy" was held to give way to the right of the press to publish matters of public interest are *Afro-American Pub. Co.* v. *Jaffe*, 366 F. 2d 649 (C. A. D. C.

arise if truth were not a defense are therefore no concern. Cf. *Garrison* v. *Louisiana*, 379 U. S. 64, 72–75.

But although the New York statute affords "little protection" to the "privacy" of a newsworthy person, "whether he be such by choice or involuntarily" [8] the statute gives him a right of action when his name, picture, or portrait is the subject of a "fictitious" report or article.[9]

Cir. 1966); *Wagner* v. *Fawcett Pubs.*, 307 F. 2d 409 (C. A. 7th Cir. 1962); *Jenkins* v. *Dell Pub. Co.*, 251 F. 2d 447 (C. A. 3d Cir. 1958); *Elmhurst* v. *Pearson*, 153 F. 2d 467 (C. A. D. C. Cir. 1946); *Thompson* v. *Curtis Pub. Co.*, 193 F. 2d 953 (C. A. 3d Cir. 1952); *Samuel* v. *Curtis Pub. Co.*, 122 F. Supp. 327 (D. C. N. D. Cal. 1954); *Miller* v. *N. B. C.*, 157 F. Supp. 240 (D. C. D. Del. 1957); *Berg* v. *Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. C. D. Minn. 1948); *Smith* v. *Doss*, 251 Ala. 250, 37 So. 2d 118 (1948); *Smith* v. *Suratt*, 7 Alaska 416 (1926); *Metter* v. *Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P. 2d 491 (1939); *Barbieri* v. *News Journal Co.*, 189 A. 2d 773 (Del. 1963); *Jacova* v. *Southern Radio & T. V. Co.*, 83 So. 2d 34 (Fla. 1955); *Waters* v. *Fleetwood*, 212 Ga. 161, 91 S. E. 2d 344 (1956); *Bazinski* v. *DoAll Co.*, 31 Ill. App. 2d 191, 175 N. E. 2d 577 (1961); *Jones* v. *Herald Post Co.*, 230 Ky. 227, 18 S. W. 2d 972 (1929); *Kelly* v. *Post Pub. Co.*, 327 Mass. 275, 98 N. E. 2d 286 (1951); *Martin* v. *Dornton*, 210 Miss. 668, 50 So. 2d 391 (1951); *Hubbard* v. *Journal Pub. Co.*, 69 N. M. 473, 368 P. 2d 147 (1962); *Schnabel* v. *Meredith*, 378 Pa. 609, 107 A. 2d 860 (1954); *Meetze* v. *Associated Press*, 230 S. C. 330, 95 S. E. 2d 606 (1956); *Truxes* v. *Kenco Enterprises*, 80 S. D. 104, 119 N. W. 2d 914 (1963). See Restatement, Torts, § 867, comment *d* (1939).

[8] "One of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that in balance with the legitimate public interest, the law affords his privacy little protection," *Spahn*, *supra*, at 328, 221 N. E. 2d 543, 545.

[9] *Binns* v. *Vitagraph Co.*, 210 N. Y. 51 (1913); *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 19 App. Div. 2d, 865, 244 N. Y. S. 2d 1 (1963); *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. S. 2d 233 (1950); *Koussevitsky* v. *Allen, Towne and Heath, Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd 272 App. Div. 759,

Spahn points up the distinction. *Spahn* was an action under the statute brought by the well-known professional baseball pitcher, Warren Spahn. He sought an injunction and damages against the unauthorized publication of what purported to be a biography of his life. The trial

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69 N. Y. S. 2d 432 (1947); *Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 295 N. Y. Supp. 382 (1937). The doctrine of "fictionalization" has been applied where there is no statute. See, *e. g.*, *Leverton* v. *Curtis Publishing Co.*, 192 F. 2d 974 (C. A. 3d Cir. 1951); *Hazlitt* v. *Fawcett Pubs.*, 116 F. Supp. 538 (D. C. D. Conn. 1953); *Garner* v. *Triangle Pubs., Inc.*, 97 F. Supp. 546 (D. C. S. D. N. Y. 1951). Commentators have likened the interest protected in those "privacy" cases which focus upon the falsity of the matter to that protected in cases of libel and slander—injury to the reputation. See Prosser, Privacy, 48 Cal. L. Rev. 398–401 (1960); Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093 (1962). But see Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 991–993 (1964). Many "right of privacy" cases could in fact have been brought as "libel per quod" actions, and several have been brought on both grounds. See, *e. g.*, *Hazlitt* v. *Fawcett Pubs., Inc.*, *supra*; *Freeman* v. *Busch Jewelry Co.*, 98 F. Supp. 963 (D. C. N. D. Ga. 1951); *Peay* v. *Curtis Publishing Co.*, 78 F. Supp. 305 (D. D. C. 1948); *Foster-Milburn* v. *Chinn*, 134 Ky. 424, 120 S. W. 364 (1909). Although not usually thought of in terms of "right of privacy," all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the "right of privacy" cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage. See Wade, *supra*, at 1124. Moreover, as *Spahn* illustrates, the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery. Our decision today is not to be taken to decide any constitutional questions which may be raised in "libel per quod" actions involving publication of matters of public interest, or in libel actions where the plaintiff is not a public official. Nor do we intimate any view whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices.

judge had found that "[t]he record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage of factual errors, distortions and fanciful passages. . . ." 43 Misc. 2d 219, 232. The Court of Appeals sustained the holding that in these circumstances the publication was proscribed by § 51 of the Civil Rights Law and was not within the exceptions and restrictions for newsworthy events engrafted on the statute. The Court of Appeals said:

> "But it is erroneous to confuse privacy with 'personality' or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected . . . . Thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that insofar as his professional career is involved, he is substantially without a right to privacy. That is not to say, however, that his 'personality' may be fictionalized and that, as fictionalized, it may be exploited for defendant's commercial benefit through the medium of an unauthorized biography." *Spahn, supra*, at 328, 221 N. E. 2d, at 545.

As the instant case went to the jury, appellee too was regarded to be a newsworthy person "substantially without a right to privacy" insofar as his hostage experience was involved, but to be entitled to his action insofar as that experience was "fictionalized" and "exploited for the defendant's commercial benefit." "Fictionalization," the *Spahn* opinion states, "is the heart of the cases in point." 18 N. Y. 2d, at 328, 221 N. E. 2d, at 545.

The opinion goes on to say that the "establishment of minor errors in an otherwise accurate" report does not prove "fictionalization." Material and substantial falsi-

fication is the test. However, it is not clear whether proof of knowledge of the falsity or that the article was prepared with reckless disregard for the truth is also required. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 we held that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Factual error, content defamatory of official reputation, or both, are insufficient to an award of damages for false statements unless actual malice—knowledge that the statements are false or in reckless disregard of the truth—is alleged and proved. The *Spahn* opinion reveals that the defendant in that case relied on *New York Times* as the basis of an argument that application of the statute to the publication of a substantially fictitious biography would run afoul of the constitutional guarantees. The Court of Appeals held that *New York Times* had no application. The court, after distinguishing the cases on the ground that *Spahn* did not deal with public officials or official conduct, then says, "The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect." 18 N. Y. 2d, at 329, 321 N. E. 2d, at 546.

If this is meant to imply that proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals.[10] We hold that the constitutional pro-

[10] Of course *Spahn* is not before us and we in no wise imply any view of the merits of the judgment or remedy afforded the plaintiff in that case. Our reliance is solely on Judge Keating's opinion as an aid to understand the construction placed on the statute by the New York courts.

tections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California*, 314 U. S. 252, 269. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. "The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]." *Winters* v. *New York*, 333 U. S. 507, 510. Erroneous statement is no less inevitable in such case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, ". . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . . ." *New York Times Co.* v. *Sullivan*, *supra*, at 271–272. As James Madison

said, "Some degree of abuse is inseparable from the proper use of everything and in no instance is this more true than of the press." 4 Elliots Debates on the Federal Constitution (1876), p. 571. We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or mere negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to "steer wider of the unlawful zone." *New York Times Co.* v. *Sullivan*, 376 U. S., at 279; see also *Speiser* v. *Randall*, 357 U. S. 513, 526; *Smith* v. *California*, 361 U. S. 147, 153–154; and thus "create the danger that the legitimate utterance will be penalized." *Speiser* v. *Randall*, *supra*, at 526.

But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no im-

munity in the case of alleged defamation of a public official's official conduct. Similarly calculated falsehood should enjoy no immunity in the situation here presented us. What we said in *Garrison* v. *Louisiana*, *supra*, 379 U. S., at 75, is equally applicable:

> "The use of the calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published . . . should enjoy a like immunity . . . . For the use of the known lie as a tool is at once at odds with premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .' *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

We find applicable here the standard of knowing or reckless falsehood not through blind application of *New York Times Co.* v. *Sullivan*, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclu-

sion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt v. Baer*, 383 U. S. 75, 91 (STEWART, J. concurring). Moreover, a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual. Different considerations might arise concerning the degree of "waiver" of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.

II.

Turning to the facts of the present case, the proofs reasonably would support either a jury finding of innocent or mere negligent misstatement by Life, or a finding that Life portrayed the play as a re-enactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false. The relevant testimony is as follows:

Joseph Hayes, author of the book, also wrote the play. The story theme was inspired by the desire to write about "true crime" and for years before writing the book, he collected newspaper clippings of stories of hostage incidents. His story was not shaped by any single incident, but by several, including incidents which occurred in California, New York, and Detroit. He said that he did not consciously portray any member of the Hill fam-

ily, or the Hill family's experience, although admitting that "in a very direct way" the Hill experience "triggered" the writing of the book and the play.

The Life article was prepared at the direction and under the supervision of its entertainment editor, Prideaux. He learned of the production of the play from a news story. The play's director, Robert Montgomery, later suggested to him that its interesting stage setting would make the play a worthwhile subject for an article in Life. At about the same time, Prideaux ran into a friend of author Hayes, a free-lance photographer, who told Prideaux in casual conversation that the play had a "substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia." As the play was trying out in Philadelphia, Prideaux decided to contact the author. Hayes confirmed that an incident somewhat similar to the play had occurred in Philadelphia, and agreed with Prideaux to find out whether the former Hill residence would be available to shoot pictures for a Life article. Prideaux then met with Hayes in Philadelphia where he saw the play and drove with Hayes to the former Hill residence to test its suitability for a picture story. Neither then nor thereafter did Prideaux question Hayes about the extent to which the play was based on the Hill incident. "A specific question of that nature was never asked, but a discussion of the play itself, what the play was about, in light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that."

Prideaux sent photographers to the Hill residence for location photographs of scenes of the play enacted in the home, and proceeded to construct the text of the article. In his "story file" were several news clippings about the Hill incident which revealed its nonviolent character,

and a *New York Times* article by Hayes in which he stated that the play "was based on various news stories," mentioning incidents in New York, California, Detroit and Philadelphia.

Prideaux's first draft made no mention of the Hill name except for the caption of one of the photographs. The text related that a true story of a suburban Philadelphia family had "sparked off" Hayes to write the novel, that the play was a "somewhat fictionalized" account of the family's heroism in time of crisis. Prideaux's research assistant, whose task it was to check the draft for accuracy, put a question mark over the words "somewhat fictionalized." Prideaux testified that the question mark "must have been" brought to his attention, although he did not recollect having seen it. The draft was also brought before the copy editor, who, in the presence of Prideaux, made several changes in emphasis and substance. The first sentence was changed to focus on the Hill incident, using the family's name; the novel was said to have been "inspired" by that incident, and the play was referred to as a "re-enactment." The words "somewhat fictionalized" were deleted.

Prideaux labeled as "emphatically untrue" defense counsel's suggestion during redirect examination that from the beginning he knew that the play had no relationship to the Hill incident apart from being a hostage incident. Prideaux admitted that he knew the play was "between a little bit and moderately fictionalized," but stated that he thought beyond doubt that the important quality, the "heart and soul" of the play, was the Hill incident.

The jury might reasonably conclude from this evidence—particularly that the New York Times' article was in the story file, that the copy editor deleted "somewhat fictionalized" after the research assistant questioned its accuracy, and that Prideaux admitted that he

knew the play was "between a little bit and moderately fictionalized"—that Life knew or was reckless of the truth in stating in the article that "the story re-enacted" the Hill family's experience. On the other hand, the jury might reasonably predicate a finding of innocent or only negligent misstatement on the testimony that a statement was made to Prideaux by the free lance photographer that linked the play to an incident in Philadelphia, that the author Hayes cooperated in arranging for the availability of the former Hill home, and that Prideaux thought beyond doubt that the "heart and soul" of the play was the Hill incident.[11]

III.

We do not think however that the instructions confined the jury to a verdict of liability based on a finding that the statements in the article were made with knowledge of their falsity or in reckless disregard of the truth. The jury was instructed that liability could not be found under §§ 50–51 "merely because of some incidental mistake of fact, or some incidental incorrect statement," and that a verdict of liability could rest only on findings that (1) Life published the article "not to disseminate news, but was using plaintiffs' name in connection with a fictionalized episode as to plaintiffs' relationship to *The Desperate Hours*"; the Court variously restated this "fictionalization" requirement in terms such as whether appellant "altered or changed the true facts concerning plaintiffs' relationship to *The Desperate Hours*, so that the article, as published, constituted substantially fiction or a fictionalized version . . . ," whether the article con-

[11] Where either result finds reasonable support in the record it is for the jury not for this Court to determine whether there was knowing or reckless falsehood. Cf. *New York Times* v. *Sullivan*, *supra*, 284–285.

stituted "fiction," or was "fictionalized"; and (2) that the article was published to advertise the play or "for trade purposes"; this latter purpose was variously defined as one "to amuse, thrill, astonish or move the reading public so as to increase the circulation of the magazine or for some other material benefit," "to increase circulation or enhance the standing of the magazine with its readers," and "for the publisher's profits through increased circulation induced by exploitation of the plaintiffs."

The court also instructed the jury that an award of punitive damages was justified if the jury found that the appellant falsely connected appellee to the play "knowingly or through failure to make a reasonable investigation," adding "You do not need to find that there was any actual ill will or personal malice toward the plaintiffs if you find a reckless or wanton disregard of the plaintiffs' rights."

Appellee argues that the instructions to determine whether Life "altered or changed" the true facts, and whether apart from incidental errors, the article was a "substantial fiction" or a "fictionalized version" were tantamount to instructions that the jury must find that Life knowingly falsified the facts. We do not think that the instructions bear that interpretation, particularly in light of the marked contrast in the instructions on compensatory and punitive damages. The element of "knowingly" is mentioned only in the instruction that punitive damages must be supported by a finding that Life falsely connected the Hill family with the play "knowingly or through failure to make a reasonable investigation." Moreover, even as to punitive damages, the instruction that such damages were justified on the basis of "failure to make a reasonable investigation" is an instruction that proof of negligent misstatement is enough, and we have rejected the test of negligent

misstatement as inadequate.[12] Next, the trial court plainly did not regard his instructions as limiting the jury to a verdict of liability based on a finding of knowing or reckless falsity; he denied appellant's motion to dismiss after the close of the evidence because he perceived that it was for the jury to find "whether the *Life* article was true or whether an inference could be obtained from reading it that it was not true." This implies a view that "fictionalization" was synonymous with "falsity" without regard to knowledge or even negligence, except for the purposes of an award of punitive damages. Finally, nothing in the New York cases decided at the time of trial limited liability to cases of knowing or reckless falsity and *Spahn*, decided since, has left the question in doubt.[13]

The requirement that the jury also find that the article was published "for trade purposes," as defined in the charge, cannot save the charge from constitutional infirmity. "That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded

[12] Although the court qualified this instruction by requiring a finding of "reckless or wanton disregard of the plaintiff's rights" in absence of a finding of "actual ill will or personal malice," this reasonably could have been taken by the jury to relate not to truth or falsity but to appellant's attitude toward appellee's privacy. Therefore even this instruction would have been constitutionally infirm. Even had the appellate division not found prejudicial error affecting the jury's award of punitive damages, the judgment before us could not be sustained on the basis of the jury's finding on that issue.

[13] The appellate division in *Spahn* v. *Julian Messner, Inc.*, 23 App. Div. 2d 216, 220, 260 N. Y. S. 2d 451, 454 (1965), stated that the concept of fictionalization rested on a "distinction between an *intentionally* fictionalized treatment and a straight factual treatment (subject to inadvertent or superficial inaccuracies) . . . ." (Emphasis supplied.) In light of the Court of Appeals opinion, we cannot accept this as an accurate statement of New York law.

by the First Amendment." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501; see *New York Times Co.* v. *Sullivan*, 376 U. S., at 266; *Smith* v. *California*, 361 U. S. 147, 150; cf. *Ex parte Jackson*, 96 U. S. 727, 733; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Lovell* v. *Griffin*, 303 U. S. 444.

IV.

The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity.[14] Such a declaration would not be warranted even if it were entirely clear that this is the view of the New York courts. The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous to construe the statute to avoid invasion of the constitutional protections for speech and press. We therefore confidently expect that the New York courts will apply the statute consistently with the constitutional command. Any possible difference with us as to the thrust of the constitutional command is narrowly limited in this case to the failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article.

The judgment of the Court of Appeals is set aside and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[14] Appellant further contends that the threat of criminal penalty invalidates the statute. However, there have been only two cases of criminal proceedings under the statute and both resulted in dismissal. *People ex rel. Maggio* v. *Charles Scribner's Sons*, 205 Misc. 818, 130 N. Y. S. 514 (1954); *People ex rel. Stern* v. *McBride*, 159 Misc. 5, 288 N. Y. S. 501 (1936). There is therefore little realistic threat of prosecution. Cf. *United States* v. *Raines*, 362 U. S. 17, 20-24 (1960).

SUPREME COURT OF THE UNITED STATES

No. 22.—October Term, 1966.

Time, Inc., Appellant, v. James J. Hill. | On Appeal From the Court of Appeals of New York.

[January 9, 1967.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.

I concur in reversal of the judgment in this case based on the grounds and reasons stated in the Court's opinion. I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in *New York Times* v. *Sullivan*, 376 U. S. 254. The Court's opinjon decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to the Court's opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, *e. g.*, *New York Times* v. *Sullivan*, 376 U. S., at 293 (concurring opinion); *Rosenblatt* v. *Baer*, 383 U. S. 75, 94 (concurring and dissenting opinion).

I.

I acquiesce in the application here of the narrower constitutional view of *New York Times* with the belief that this doctrine too is bound to pass away as its application to new cases proves its inadequacy to protect freedom of the press from destruction in libel cases and other cases like this one. The words "malicious" and particularly "reckless disregard of the truth" can never serve as effective substitutes for the First Amendment words: ". . . make no law . . . abridging the freedom

of speech, or of the press . . . ." Experience, I think, is bound to prove that First Amendment freedoms can no more be permanently diluted or abridged by this Court's action than could the Sixth Amendment's guarantee of right to counsel. I think the fate that befell *Betts* v. *Brady*, 316 U. S. 455 (cf. *Gideon* v. *Wainwright*, 372 U. S. 335), is already foreseeable, even if only dimly, for the *New York Times*' dilution of First Amendment rights.

II.

I think it not inappropriate to add that it would be difficult, if not impossible, for the Court ever to sustain a judgment against Time in this case without using the recently popularized weighing and balancing formula. Some of us have pointed out from time to time that the First Amendment freedoms could not possibly live with the adoption of that Constitution ignoring and destroying technique,[1] when there are, as here, palpable penalties imposed on speech or press specifically because of the views that are spoken or printed. The prohibitions of the Constitution were written to prohibit certain specific things, and one of the specific things prohibited is a law which abridges freedom of the press. That freedom was written into the Constitution and that Constitution is or should be binding on judges as well as other officers. The "weighing" doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges

[1] See, *e. g.*, *In re Anastaplo*, 366 U. S. 82, 97 (dissenting opinion); *Braden* v. *United States*, 365 U. S. 431, 438 (dissenting opinion); *Barenblatt* v. *United States*, 360 U. S. 109, 140–145 (dissenting opinion).

swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up.

Finally, if the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranted by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unrepealed.[2] If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms. If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger to its freedom, inherent and certain in this "weighing process." Life's conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event. One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news

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[2] Jefferson wrote that the purpose of the First Amendment is ". . . guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals." 8 Jefferson, Works 464–465 (Ford ed. 1904).

in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy of the newsworthy facts.[3] Such a consummation hardly seems consistent with the clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society.

[3] See for example, *Butts* v. *Curtis Publishing Co.*, 351 F. 2d 702 ($3,000,000 libel judgment, cut to $460,000 on appeal), cert. granted, *post*, p. 811; *The Associated Press* v. *Walker*, 393 S. W. 2d 671 (Tex. Civ. App.) ($500,000 libel judgment), cert. granted, *post*, p. 812; *New York Times* v. *Sullivan*, 376 U. S. 254 ($500,000 libel judgment, reversed).

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No. 22.—October Term, 1966.

Time, Inc., Appellant, v. James J. Hill. | On Appeal to the Court of Appeals of the State of New York.

[January 9, 1967.]

Mr. Justice Douglas, concurring.

As intimated in my separate opinion in *Rosenblatt* v. *Baer*, 383 U. S. 75, 88, and in the opinion of my Brother Black in the same case, *id.*, at 94, state action to abridge freedom of the press is barred by the First and Fourteenth Amendments where the discussion concerns matters in the public domain. The episode around which this book was written had been news of the day for some time. The most that can be said is that the novel, the play, and the magazine article revived that interest. A fictionalized treatment of the event is, in my view, as much in the public domain as would be a watercolor of the assassination of a public official. It seems to me irrelevant to talk of any right of privacy in this context. Here a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Such privacy as a person normally has ceases when his life has ceased to be private.

Once we narrow the ambit of the First Amendment, creative writing is imperiled and the "chilling effect" on free expression which we feared in *Dombrowski* v. *Pfister*, 380 U. S. 479, 487,* is almost sure to take place. That

*And see *Baggett* v. *Bullitt*, 377 U. S. 360; *NAACP* v. *Button*, 371 U. S. 415.

is, I fear, the result once we allow an exception for "knowing or reckless falsity." Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day. The exception for "knowing and reckless falsity" is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments. But as indicated in my Brother BLACK's opinion I have joined the Court's opinion in order to make possible an adjudication that controls this litigation. Cf. Mr. Justice Rutledge, concurring, *Screws* v. *United States*, 325 U. S. 91, 113, 134.

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[January 9, 1967.]

Mr. Justice Harlan, concurring in part and dissenting in part.

While I find much with which I agree in the opinion of the Court, I am constrained to express my disagreement with its view of the proper standard of liability to be applied on remand. Were the jury on retrial to find negligent rather than, as the Court requires, reckless or knowing "fictionalization," I think that federal constitutional requirements would be met.

I.

The Court's opinion demonstrates that the fictionalization doctrine upon which New York premises liability is one which would strip newsworthy material, otherwise protected, of its constitutional shield upon a mere showing of substantial falsity. I agree that the compensatory damage instruction given by the trial court required only such a determination and a finding of "commercial purpose" to sustain liability. And reading the opinion of the Appellate Division in the light of other New York decisions I believe that this was the theory upon which the jury finding was sustained.[1] True

[1] The majority in the New York Appellate Division denied that the article could "be characterized as a mere dissemination of news, nor even an effort to supply legitimate newsworthy information . . . ." They added that "points of similarity in the book and the occurrence . . . justified neither the identification nor the com-

the trial court told the jury that they must find that the appellant "altered or changed the true facts." But it did not specify whether this alteration or change would have to be reckless or negligent, or whether innocent variation from the facts as found by the jury would suffice for the award of damages. Clearly knowing falsification was not required, for the court refused appellant's request to charge that the jury must find in its favor unless they found knowing falsification.

The instructions on punitive damages required the jury to find at least "failure to make a reasonable investigation," in my view a crucial determination. However, the entire damage award was set aside as excessive by the Appellate Division which found it unduly influenced by inflammatory evidence. On remand for reconsideration of damages, only a compensatory award was made. This was the award affirmed by the Court of Appeals in the decision we are reviewing. With the case in this posture, I do not think it can fairly be said that there has been a binding jury interpretation of the degree of fault involved in the fictionalization and I agree with the Court that the conduct involved would bear a variety of interpretations.

Like the Court, I consider that only a narrow problem is presented by these facts. To me this is not "privacy"

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mercial exploitation of plaintiff's name and family with the play." Justice Rabin, concurring, agreed that the subject could have been presented without liability "albeit the presentation of such newsworthy material increases the publisher's circulation." The New York Court of Appeals affirmed "on the majority and concurring opinions at the Appellate Division." The decision below seems to have ample support in New York law. See, *e. g.*, *Spahn* v. *Julian Messner, Inc.*, — N. Y. —, — N. E. 2d —; *Binns* v. *Vitagraph Co.*, 147 App. Div. 783, 132 N. Y. S. 237, aff'd, 210 N. Y. 51, 103 N. E. 1108; *Youssoupoff* v. *CBS, Inc.*, 41 Misc. 2d 42, 244 N. Y. S. 2d 701, aff'd, 19 A. D. 2d 865, 244 N. Y. S. 2d 1; *Koussevitsky* v. *Allen, Towne & Heath Inc.*, 188 Misc. 479, 68 N. Y. S. 2d 779, aff'd, 272 App. Div. 759, 69 N. Y. S. 2d 432.

litigation in its truest sense. See Prosser, Torts § 112; Silver, Privacy and the First Amendment, 34 Ford. L. Rev. 553; but see Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962. No claim is made that there was any intrusion upon the Hills' solitude or private affairs in order to obtain information for publication. The power of a State to control and remedy such intrusion for newsgathering purposes cannot be denied, cf. *Mapp* v. *Ohio*, 367 U. S. 643, but is not here asserted. Similarly it may be strongly contended that certain facts are of such limited public interest and so intimate and potentially embarrassing to an individual that the State may exercise its power to deter publication. *Feeney* v. *Young*, 191 App. Div. 501, 181 N. Y. S. 481; see *Sidis* v. *F–R Pub. Co.*, 113 F. 2d 806, 808. But the instructions to the jury, the opinions in the New York appellate courts, and indeed the arguments advanced by both sides before this Court all recognize that the theme of the article in question was a perfectly proper one and that an article of this type could have been prepared without liability. *Winters* v. *New York*, 333 U. S. 507, 510. The record is replete with articles commenting on the genesis of The Desperate Hours, one of which was prepared by the author himself and used by appellee to demonstrate the supposed falsity of the Life piece. Finally no claim is made that appellant published the article to advance a commercial interest in the play. There is no evidence to show that Time, Inc., had any financial interest in the production or even that the article was published as an advertisement. Thus the question whether a State may apply more stringent limitations to the use of the personality in "purely commercial advertising" is not before the Court. See *Valentine* v. *Chrestensen*, 316 U. S. 52.

II.

Having come this far in step with the Court's opinion, I must part company with its sweeping extension of the principles of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. It was established in *Times* that mere falsity will not suffice to remove constitutional protection from published matter relating to the conduct of a public official that is of public concern. But that decision and those in which the Court has developed its doctrine, *Rosenblatt* v. *Baer*, 383 U. S. 75, *Garrison* v. *Louisiana*, 379 U. S. 64, have never found independent value in false publications[2] nor any reason for their protection except to add to the protection of truthful communication. And the Court has been quick to note that where private actions are involved the social interest in individual protection from falsity may be substantial. *Rosenblatt* v. *Baer*, *supra*, pp. 86–87, n. 13. Thus I believe that rigorous scrutiny of the principles underlying the rejection of the mere falsity criterion and the imposition of ancillary safeguards, as well as the interest which the State seeks to protect, is necessary to reach a proper resolution of this case.

Two essential principles seem to underlie the Court's rejection of the mere falsity criterion in *Times*. The first is the inevitability of some error in the situation presented in free debate especially when abstract matters are under consideration. Certainly that is illustrated

[2] The passage from *Garrison* v. *Louisiana*, *supra*, quoted in the opinion of the Court makes clear that the only interest in protecting falsehood is to give added "breathing space" to truth. It is undeniable that falsity may be published, especially in the political arena, with what may be considered "good" motives, for example a good-faith belief in the absolute necessity of defeating an "evil" candidate. But the Court does not remove state power to control such conduct, thus underlining the strong social interest in discouraging false publication.

here in the difficulty to be encountered in making a precise description of the relationship between the Hill incident and The Desperate Hours. The second is the Court's recognition that in many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is "true" may effectively institute a system of censorship. Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 310. "The marketplace of ideas" where it functions still remains the best testing ground for truth.

But these arguments against suppressing what is found to be "false" on that ground alone do not negative a State's interest in encouraging the publication of well researched materials more likely to be true. Certainly it is within the power of the State to use positive means—the provision of facilities[3] and training of students[4]—to further this end. The issue presented in this case is the constitutionality of a State's employment of sanctions to accomplish that same goal. The Court acknowledges that sanctions may be employed against knowing or reckless falsehoods but would seem to grant a "talismanic immunity" to all unintentional errors. However, the distinction between the facts presented to us here and the situation at issue in the *Times* case and its progeny casts serious doubt on that grant of immunity and calls for a more limited "breathing space" than that granted in criticism of public officials.

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[3] Thus the State may take land for the construction of library facilities. *E. g.*, *Heyford* v. *Bangor*, 102 Me. 340, 66 A. 731; *Laird* v. *Pittsburg*, 205 Pa. 1, 54 A. 324.

[4] Thus many state universities have professional schools of journalism. See 3 Department of Health, Educ. & Welfare, Education Directory—Higher Education.

First, we cannot avoid recognizing that we have entered an area where the "marketplace of ideas" does not function and where conclusions premised on the existence of that exchange are apt to be suspect. In *Rosenblatt* v. *Baer*, *supra*, the Court made the *Times* rationale operative where "the public has an independent interest in the qualifications and performance of the person who holds it [government position], beyond the general public interest in the qualifications and performance of all government employees . . . ." *Id.*, at 86. In elaboration the Court said: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.*, at 87, n. 13. To me this seems a clear recognition of the fact that falsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is "occasioned by the particular charges in controversy" and the matter is not one in which the public has an "independent interest." It would be unreasonable to assume that Mr. Hill could find a forum for making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society. Thus the state interest in encouraging careful checking and preparation of published material is far stronger than in *Times*. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.[4]

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[4] See Riesman, Democracy and Defamation, Fair Game and Fair Comment I, 42 Col. L. Rev. 1085; *Beauharnais* v. *Illinois*, 343 U. S. 250; *State* v. *Klapprott*, 127 N. J. L. 395, 22 A. 2d 877. And de-

Second, there is a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official. In *Times* we acknowledged public officials to be a breed from whom hardiness to exposure to charges, innuendos, and criticisms might be demanded and who voluntarily assumed the risk of such things by entry into the public arena. 376 U. S., at 273. But Mr. Hill came to public attention through an unfortunate circumstance not of his making rather than his voluntary actions and he can in no sense be considered to have "waived" any protection the State might justifiably afford him from irresponsible publicity. Not being inured to the vicissitudes of journalistic scrutiny such an individual is more easily injured and his means of self-defense are more limited. The public is less likely to view with normal skepticism what is written about him because it is not accustomed to seeing his name in the press and expects only a disinterested report.

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spite the Court's denial that the opportunity for rebuttal is germane, it must be the circulation of falsity and the harm stemming from it which leads the Court to allow the imposition of liability at all. For the Court finds the subject of the Life article "a matter of public interest." And it states that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilised community." Thus it could not permit New York to allow compensation for mere exposure unless it is holding, as I am sure it is not, that the presence of some reckless falsehood in written material stripe it of all constitutional protection. The Court's suggestion that Mr. Hill might not be anxious to rebut the falsehood because it might increase his harm from exposure is equally applicable to libel actions where the opportunity to rebut may be limited by fear of reiterating the libel. And this factor emphasizes, rather than lessens, the state interest in discouraging falsehood for it increases the likelihood that falsity will continue to circulate to the detriment of some when truth should be encouraged "for the benefit of all of us."

The coincidence of these factors in this situation leads me to the view that a State should be free to hold the press to a duty of making a reasonable investigation of the underlying facts and limiting itself to "fair comment" [6] on the materials so gathered. Theoretically, of course, such a rule might slightly limit press discussion of matters touching individuals like Mr. Hill. But, from a pragmatic standpoint, until now the press, at least in New York, labored under the more exacting handicap of the existing New York privacy law and has certainly remained robust. Other professional activity of great social value is carried on under a duty of reasonable care [7] and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The "freedom of the press" guaranteed by the First

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[6] A negligence standard has been applied in libel actions both where the underlying facts are alleged to be libelous, *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, and where comment is the subject of the action, *Clancy* v. *Daily News Corp.*, 202 Minn. 1, 277 N. W. 2d 264. Similarly the press should not be constitutionally insulated from privacy actions brought by parties in the position of Mr. Hill when reasonable care has not been taken in ascertaining or communicating the underlying facts or where the publisher has not kept within the traditional boundaries of "fair comment" with relation to underlying facts and honest opinion. See Prosser, Torts § 110, at 815–816. Similar standards of reasonable investigation and presentation have long been applied in misrepresentation cases. See, *e. g.*, *International Products Co.* v. *Erie R. Co.*, 244 N. Y. 331, 155 N. E. 662; *Nash* v. *Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N. E. 1039. Under such a standard the fact that the publication involved in this case was not defamatory would enter into a determination of the amount of care which would have been reasonable in the preparation of the article.

[7] See, *e. g.*, McCoid, The Care Required of Medical Practitioners, 12 Vand. L. Rev. 549; Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755. It may be argued that other professions are distinguishable because practitioners may insure against liability. But this course is also open to the press. Developments in the Law, Defamation, 69 Harv. L. Rev. 875, 906.

Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.* The majority would allow sanctions against such conduct only when it is morally culpable. I insist that it can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it. I would remand the case to the New York courts for possible retrial under that principle.

A constitutional doctrine which relieves the press of even this minimal responsibility in cases of this sort seems to me unnecessary and ultimately harmful to the permanent good health of the press itself. If the *New York Times* case has ushered in such a trend it will prove in its long-range impact to have done a disservice to the true values encompassed in the freedoms of speech and press.

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* This Court has never held that the press has an absolute privilege to publish falsity. There is nothing in the history of the First Amendment, or the Fourteenth, to indicate that the authors contemplated restrictions on the ability of private persons to seek legal redress for press-inflicted injury. See generally Levy, Legacy of Suppression; Duniway, The Development of Freedom of the Press in Massachusetts. The Founders rejected an attempt by Madison to add to Art. I, § 10, a guarantee of freedom of the press against state action. The main argument advanced against it was that it would unduly interfere with the proper powers of the States. See Madison's Writings (Hunt ed.) 378; 1 Annals of Cong. 756.

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No. 22.—October Term, 1966.

Time, Inc., Appellant, v. James J. Hill. | On Appeal From the Court of Appeals of New York.

[January 9, 1967.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Clark join, dissenting.

The Court's holding here is exceedingly narrow. It declines to hold that the New York "Right of Privacy" statute is unconstitutional. I agree. The Court concludes, however, that the instructions to the jury in this case were fatally defective because they failed to advise the jury that a verdict for the plaintiff could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article. Presumably, the plaintiff is entitled to a new trial. If he can stand the emotional and financial burden, there is reason to hope that he will recover damages for the reckless and irresponsible assault upon himself and his family which this article represents. But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms. Short of that purpose, with which I would strongly disagree, there is no reason here to order a new trial. The instructions in this case are acceptable even within the principles today announced by the Court.

I fully agree with the views of my Brethren who have stressed the need for a generous construction of the First

Amendment. I, too, believe that freedom of the press, of speech, assembly, and religion, and the freedom to petition are of the essence of our liberty and fundamental to our values. See, *e. g.*, *Brown* v. *Louisiana*, 383 U. S. 131 (1966). I agree with the statement of my Brother BRENNAN, speaking for the Court in *NAACP* v. *Button*, 371 U. S. 415, 433 (1963), that "These freedoms are delicate and vulnerable, as well as supremely precious in our society." But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights—how remote from public purpose, how reckless, irresponsible, and untrue it may be. I do not believe that the First Amendment precludes effective protection of the right of privacy—or, for that matter, an effective law of libel. I do not believe that we must or should, in deference to those whose views are absolute as to the scope of the First Amendment, be ingenious to strike down all state action, however circumspect, which penalizes the use of words as instruments of aggression and personal assault. There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. Judge Cooley long ago referred to this right as "the right to be let alone."[1] In 1890, Warren and Brandeis published their famous article "The Right to Privacy," in which they eloquently argued that the "excesses" of the press in "overstepping in every direction the obvious bounds of propriety and decency" made it essential that the law recognize a right to privacy, distinct from traditional

[1] Cooley, Torts, 29 (2d ed. 1888).

remedies for defamation, to protect private individuals against the unjustifiable infliction of mental pain and distress.[2] A distinct right of privacy is now recognized, either as a "common-law" right or by statute, in at least 35 States.[3] Its exact scope varies in the respective jurisdictions. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, instrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Brandeis said in his famous dissent in *Olmsted* v. *United States*, 277 U. S. 438, 478 (1928), the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

This Court has repeatedly recognized this principle. As early as 1886, in *Boyd* v. *United States*, 116 U. S. 616, 630, this Court held that the doctrines of the Fourth and Fifth Amendments "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."

In 1949, the Court, in *Wolf* v. *Colorado*, 338 U. S. 25, 28–29, described the immunity from unreasonable search and seizure in terms of "the right of privacy."[4]

Then, in the landmark case of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), this Court referred to "the right to privacy," "no less important than any other right care-

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[2] 4 Harv. L. Rev. 193 (1890). See Prosser, Law of Torts, pp. 829 ff. (3d ed. 1964).

[3] Prosser, *op. cit. supra*, pp. 831, 832.

[4] *Wolf* held that the basic values of the Fourth Amendment apply to the States via the Fourteenth, but declined to require the States to exclude illegally seised evidence in criminal trials. In this latter respect it was overruled by *Mapp* v. *Ohio*, *infra*.

fully and particularly reserved to the people," as "basic to a free society." *Id.*, at 656. MR. JUSTICE CLARK, speaking for the Court, referred to "the freedom from unconscionable invasions of privacy" as intimately related to the freedom from convictions based upon coerced confessions. He said that both served the cause of perpetuating "principles of humanity and civil liberty [secured] . . . only after years of struggle." *Id.*, at 657, quoting from *Bram* v. *United States*, 168 U. S. 532, 543–544 (1897). He said that they express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Ibid.*, quoting from *Feldman* v. *United States*, 322 U. S. 487, 489–490 (1944).

In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the Court held unconstitutional a state law under which petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The holding was squarely based upon the right of privacy which the Court derived by implication from the specific guarantees of the Bill of Rights. Citing a number of prior cases, the Court (per DOUGLAS, J.) held that "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*, at 485. As stated in the concurring opinion of Mr. Justice Goldberg, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN joined: "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" *Id.*, at 494.[5]

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[5] Last Term, in *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966), MR. JUSTICE STEWART, concurring, referred to the "right of man to the protection of his own reputation from unjustified invasion and wrongful hurt" as reflecting "our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." He referred to the "protection

Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. Cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), sustaining a local ordinance regulating the use of sound trucks; and *Breard* v. *Alexandria*, 341 U. S. 622 (1951), sustaining a state law restricting solicitation in private homes of magazine subscriptions. Difficulty presents itself because the application of such state legislation may impinge upon conflicting rights of those accused of invading the privacy of others. But this is not automatically a fatal objection.[6] Particularly where the right of privacy is invaded by words—by the press or in a book or pamphlet—the most careful and sensitive appraisal of the total impact of the claimed tort upon the congeries of rights is required. I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and are entitled to at least the types of protection that this Court extended in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). But I certainly concur with the Court that the greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuri-

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of private personality, like the protection of life itself," as entitled to "recognition by this Court as a basic of our constitutional system." See also MR. JUSTICE DOUGLAS, dissenting, in *Poe* v. *Ullman*, 367 U. S. 497, 521 (1961).

[6] Cf. *Breard*, *supra*, at 625–626:

". . . There is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable privilege, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose."

ously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal. My difficulty is that while the Court gives lip-service to this principle, its decision, which it claims to be based on erroneous instructions, discloses hesitancy to go beyond the verbal acknowledgment.

The Court today does not repeat the ringing words of so many of its members on so many occasions in exaltation of the right of privacy. Instead, it reverses a decision under the New York "Right of Privacy" statute because of the "failure of the trial judge to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." In my opinion, the jury instructions, although they were not a text-book model, satisfied this standard.

In the first place, the Court does not adequately deal with the fact that the jury returned a verdict for exemplary or punitive damages, under special instructions dealing with them, as well as for compensatory damages. As to exemplary damages, the jury was specifically instructed that these might be awarded "only" if the jury found from the evidence that the defendant "falsely connected plaintiffs with The Desperate Hours and that this was done knowingly or through failure to make a reasonable investigation." The jury was then informed that "You do not need to find that there was any actual ill will or personal malice toward the plaintiffs *if you find a reckless or wanton disregard of the plaintiffs' rights.*" The jury awarded $50,000 compensatory and $25,000 punitive damages. The judgment was reversed solely on the quantum of damages, the Appellate Division sustaining the finding of liability for both compensatory and exemplary damages. The Appellate Division's conclusion was that the award of damages was excessive, and it criticized the admission of certain evidence as im-

properly tending to cause the jury to return inflated damages. In subsequent proceedings before the trial court on assessment of damages, a jury was waived by stipulation of the parties, the case proceeded to reassessment of damages and the judge fixed the amount of damages at $30,000, compensatory only. Judgment thereupon was affirmed by the Appellate Division and the Court of Appeals. It is this judgment that is before us — namely, jury findings of liability based on instructions covering both exemplary and compensatory damages, and an award stated to be for compensatory damages alone.[1]

The Court refers only to that part of the instructions as to exemplary damages which speaks in terms of the "failure to make a reasonable investigation," and condemns it as permitting a verdict based solely on "negligent misstatement." I respectfully submit that the instruction cannot fairly be so read. The instruction requires the jury to find both (1) that defendant "falsely connected" plaintiffs with the play, and (2) did so knowingly or through failure to make a reasonable investigation. This is certainly a charge satisfying the Court's requirement that "a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article." An error in the course of investigation might be mere negligent misstatement. Failure to make a reasonable investigation is something else. The standard of a "reasonable investigation" is certainly a minimum yardstick by which to measure the liability of publishers. It is certainly not incompatible with the full flavor of the First Amendment and disregard of which in the circumstances is

[1] There is no indication in the record that the court's award was intended to set aside or otherwise nullify the jury's finding under the punitive damage restrictions.

recklessness. It might well be that what constitutes an adequate basis for a jury finding of failure to make a reasonable investigation would differ, for example, in the case of a daily newspaper as compared with a feature magazine. But here no such problem arises. The truth was in a folder on the desk of the author of the story. It was deliberately disregarded by his editor. Lead time on the story was three months.[8]

In addition, however, even if appellee had to rely only upon the instructions to the jury on compensatory damages, I do not agree that we should set aside the jury verdict and reverse the New York Court of Appeals. Such drastic action—the reversal of a jury verdict by this remote Court—is justified by the Court on the ground that the standard of liability on which the jury was instructed contravenes the First Amendment. But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from trial judge to a jury of ordinary people, entitled to be appraised in terms of its net effect. Instructions are to be viewed in this commonsense perspective, and not through the remote and distorting knothole of a distant appellate fence. Read in this perspective, the core of the instructions here on compensatory damages—even if we disregard the fact that the jury found liability under the

[8] The majority seek to avoid the impact of the instruction's reference to the necessity of finding "a reckless or wanton disregard of the plaintiffs' rights" by speculating that this referred only to failure to obtain consent and not to falsity. Not only is there no basis for this speculation, but the placing of this part of the instruction—immediately after the discussion of falsity—suggests that the contrary is true.

more exacting instructions relating to exemplary damages—was sufficient to meet the majority's test. The gravamen of the court's charge, repeated *three times* in virtually the same words, was the following:

> "It is for you to determine whether in publishing the article the defendant Time, Inc. *altered* or *changed* the true facts concerning plaintiffs' relationship to The Desperate Hours, so that the article, as published, constituted substantially a *fictionalized version* for trade purposes . . . ." (Emphasis supplied.)

The jury was also instructed that "Before the plaintiffs can be entitled to a verdict . . . you must find that the statements concerning the plaintiffs in the article *constituted fiction*, as compared with news or matters which were newsworthy." (Emphasis supplied.) With all respect, I submit that this is close enough to this Court's insistence upon "knowing or reckless falsity" as to render a reversal arbitrary and unjustified. If the defendant *altered* or *changed* the true facts so that the article as published was a *fictionalized* version, this, in my judgment, was a knowing or reckless falsity. "Alteration" or "change" denotes a positive act—not a negligent or inadvertent happening. "Fictionalization" and "fiction" to the ordinary mind mean so departing from fact and reality as to be *deliberately* divorced from the fact—not merely in detail but in general and pervasive impact.[9]

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[9] The court's charge and the New York cases emphasize this definition. The most important recent case is *Spahn* v. *Messner*, — N. Y. 2d —, — N. E. 2d — (1960). In *Spahn*, the Supreme Court of New York observed: "While untrue statements do not necessarily transform a book into the category of fiction, the *all-pervasive* distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very best, a careless

The English language is not so esoteric as to permit serious consequences to turn upon a supposed difference between the instructions to the jury and this Court's formulation. Nor is the First Amendment in such delicate health that it requires or permits this kind of surgery, the net effect of which is not only an individual injustice, but an encouragement to recklessness and careless readiness to ride roughshod over the interests of others.

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility to that freedom. This Court cannot and should not refuse to per-

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disregard for the responsibility of the press and within the context of this action, an abuse of the press' limited privilege to inquire into an individual's life." 43 Misc. 2d 219, 230 (1964). Affirming, the Appellate Division (per Breitel, J.) observed that the book in question had been "fictionalized, concededly, in order to make it suitable for a juvenile readership" and the publishers "made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline." 23 App. Div. 2d 216, 219 (1st Dept. 1965). The Appellate Division surveyed the earlier New York cases, including the present *Hill* case, and concluded they were all based on the "distinction between *an intentionally fictionalized treatment* and a straight factual treatment (subject to inadvertent or superficial inaccuracies). . . ." *Id.*, at 220. (Italics added.)

mit under state law the private citizen who is aggrieved by the type of assault which we have here and which is not within the specially protected core of the First Amendment to recover compensatory damages for recklessly inflicted invasion of his rights.

Accordingly, I would affirm.